Supreme Court, U. S.
FILED
OCT 21 1980
MICHAEL RODAK, JR., CLERK

80-668

No. 80-

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

WESTERN AIR LINES, INC.
Petitioner,

vs.

INTERNATIONAL TRAVEL ARRANGERS, INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sherman Act can be used to impose a standard of absolute accuracy on a firm that seeks to compete by using the most constructive and useful form of advertising — ads containing detailed comparative information — merely because the purpose of the ad's sponsor is to prevail against its competitors?

2. Whether every firm that employs an advertising agency must risk being held liable for a "conspiracy" in restraint of trade?

3. Whether there was a total failure of appellate review of the sufficiency of the evidence on the issue of market leverage?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Western Air Lines, Inc. ("Western"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is published at 623 F.2d 1255. The district court did not issue an opinion, but entered an order adopting, with one exception, the findings of fact of the United States magistrate, acting as a special master, and accepting the magistrate's recommendation for judgment. The magistrate filed an unpublished memorandum in conjunction with its findings of fact, conclusions of law, and recommendation. An earlier opinion of the district

court denying petitioner's motion to dismiss or stay respondent's action on the ground that exclusive or primary jurisdiction over the subject matter of this case lies with the United States Civil Aeronautics Board is published at 408 F. Supp. 431. Copies of the Court of Appeals' opinion, all relevant orders of the district court, the special master's findings of fact, conclusions of law and recommendation, and the special master's memorandum are in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 10, 1980. On August 18, 1980, Mr. Justice Blackmun extended petitioner's time to file a petition for certiorari until October 7, 1980. On September 26, 1980, Mr. Justice Blackmun further extended petitioner's time to file a petition for certiorari until October 21, 1980. The court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sherman Antitrust Act of 1890, 26 Stat. 209, as amended, 15 U.S.C. §§ 1 *et seq.*:

> "Sec. 1. [15 U.S.C. § 1] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
>
> "Sec. 2. [15 U.S.C. § 2] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several

States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Clayton Antitrust Act, § 4, 38 Stat. 731, 15 U.S.C. § 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

The decision of the Eighth Circuit in this case is a fundamental perversion of the Sherman Act. Stripped of the antitrust platitudes in which it is buried, the opinion below condemns the slightest inaccuracy in comparative advertising if the intent of the sponsor is to prevail against its competitors. This Court has reversed less extreme betrayals of the purpose of the Sherman Act. It ought to take and reverse this case to return advertising to the arena of healthy competition.

Facts of The Case

Parties Involved. Western is a regularly scheduled airline. In 1973, Western's fare and routes were subject to comprehensive Civil Aeronautics Board ("CAB") regulation. Pursuant to that regulation, Western was authorized to serve numerous routings from Minneapolis-St. Paul, including service to Las Vegas, Hawaii and Mexico. As a product of CAB route awards then in effect, Western served the predominant volume of consumer traffic from the Twin Cities to Hawaii and to Las Vegas.

Respondent, International Travel Arrangers ("ITA"), organizes charter flights in and out of Minnesota in com-

petition with regularly-scheduled airlines. In 1973, ITA competed with Western for customers wishing to travel to Hawaii and Mexico, and was an aggressive promoter and advertiser of Travel Group Charters ("TGCs"), a new form of charter air service. ITA's TGCs were marketed through travel agencies, which are the independent distributors of the air travel industry.

Minnesota State Automobile Association (MSAA) is a major Minnesota travel agency through which both ITA and Western sought to obtain travel business.

Travel Group Charters. The CAB first authorized TGCs in 1972. 37 Fed. Reg. 20815 (1972). Unlike previous types of authorized charters, TGCs could be marketed directly to individual travelers. This aspect of TGC authority initiated, for the first time, direct competition between charters and scheduled airline service for the patronage of the individual ticket buyers.

TGCs offered low ticket cost, but not without drawbacks. Each passenger had to contract to purchase his ticket at least 90 days before the flight was scheduled to depart. 14 C.F.R. § 372a.22(b) (1973). He contracted to pay his prorata share of the total charter cost plus a "service charge" constituting the organizer's markup. *Id.* § 372a.10 (g). Thus, the passenger did not know what his actual fare would be when he signed up. The ultimate fare depended on the final number of participants — the fewer the passengers, the greater each passenger's fare, and vice versa.

At the time that a passenger reserved space on a TGC, he had to pay a deposit of at least 25% of the minimum prorata fare. *Id.* § 372a.11. Sixty days prior to departure, the passenger had to pay the balance. *Id.* § 372a.15(a). Finally, 45 days before departure, the actual prorata fare was computed and each passenger had to pay the additional amount. *Id.* § 372a.15(e).

Under certain circumstances, TGC deposits were not refundable in the event of passenger cancellation. Less than 120 days, but more than 45 days before the scheduled departure, a refund was allowed in only two circumstances:

(1) in the event of death or doctor-certified illness preventing travel, or (2) if a willing substitute could be found to assume the passenger's contract. Substitutes could only come from an official "standby list," and only 20% total substitution was permissible on a charter. *Id.* §§ 372a.15(b) & (g). Within 45 days of scheduled departure, a passenger could not obtain a refund even in the case of death or illness unless a substitute could be found from the standby list. *Id.* § 372a.15(b). Loss of deposit was not a trivial risk; apart from the limit on substitution, as departure time approached, persons on the standby list, having made other plans, often declined to participate. 5 Tr. 353-63.[1]

Another drawback of TGC service was the risk that the passenger would find his charter cancelled out from under him. If the flight was not filled 90 days before scheduled departure, it had to be cancelled. 14 C.F.R. §§ 372a.12(a)(1) & 372a.18 (1973). Furthermore, if because of cancellations or defaults, the actual prorata fare would be more than 120% of the minimum prorata fare, the charter also had to be cancelled. *Id.* §§ 372a.14(b) & 372a.15(d). Thus, the regulations clearly indicated that a traveler could "plunk down" his deposit, but "end up going absolutely nowhere." *See* 4 Tr. 319-22; Ex. F.

Western's Reaction to TGC Competition. Because minimum TGC fares were normally cheaper than fares for regularly-scheduled flights, such charters threatened to siphon off a major part of Western's business. Western could not compete with TGCs on price alone because of CAB restrictions, and because Western's costs in flying scheduled service were entirely different than charter costs. The TGC operators thus had a price advantage over Western, and they used this advantage as a competitive weapon by advertising TGC prices on terms that omitted or minimized the drawbacks of TGC travel as compared with scheduled airline service.

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1. References to the trial transcript are indicated by the abbreviation "Tr." References to trial exhibits are indicated by the abbreviation "Ex." Respondent's exhibits were marked numerically; petitioner's exhibits were marked alphabetically.

ITA's Hawaii ad, for example, boldly displayed the $199 minimum prorata fare as if it were a set fare. The ad's only bow to the fact that the fare would increase if a flight was not full was buried towards the bottom of the ad in a cryptic note that $199 was the "round trip air fare, min. pro rata. . . . Cost cannot exceed $238.80 or payment will be refunded, flight cancelled." The ITA ad failed entirely to mention that a passenger might lose his money if he had to cancel, or that the flight might be cancelled when it was too late to make comparable arrangements. Ex. K.[2]

Western responded to TGC competition with an "anti-TGC campaign" that consisted of actively advising travel agents and the public of those aspects of TGCs which Western believed were inferior to Western's arrangements. In the Minneapolis-St. Paul area, Western (1) published an informative newspaper ad that highlighted the drawbacks to TGCs which promoters of TGCs like ITA failed to even mention, (2) sponsored radio commercials asking consumers to read the newspaper ad, and (3) mailed copies of the ad to travel agents with encouragement that they promote Western's services over TGC services. According to the special master, Western hoped that this campaign would "prevent the TGC . . . from effectively competing with regularly scheduled air service." App. 19d.

The district court and Court of Appeals condemned Western's actions as "unreasonable." Particular condemnation was reserved for the newspaper ad. A copy of the

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2. Concerned that the public would not understand the variability of TGC fares, the CAB specifically required that "any announcement or statement to prospective charter participants giving price per seat" note that the fare was "dependent upon the number of seats sold" and that the fare could increase up to 20 percent "as a result of defaults by participants." 14 C.F.R. § 372a.28 (1973). ITA's ads omitted such information.

The CAB also required TGC organizers to submit samples of their proposed promotional materials for review when they filed for a particular charter. *Id.* § 372a.22(a)(5). ITA's proposed ad copy did warn travelers of various TGC drawbacks. Exh. 13. These warnings, however, did not appear in ITA's published ad.

ad, consisting of almost 1,000 words, is reproduced on the following page. Taken as a whole, the ad attempts to list the drawbacks of TGC travel. Buried at seven different places are statements the special master found to be false or misleading. (These statements are shaded.) Although one of the seven statements (the statement noting that all Twin Cities TGCs to Hawaii had had to be cancelled), was mistakenly inaccurate, the remaining six were correct in fact. These six were held to be "misleading," and in some cases "false," because they stated only the adverse facts about TGCs, and omitted arguments that TGC operators might have made to dispel those facts. The special master's specific findings on the six "misleading" statements are summarized in the footnote.[3]

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3. The six true statements nevertheless found to be "misleading" and in some cases "false" were:

   1. "The upshot of it all being that you can plunk down a couple of hundred dollars (or more) for airfare and even more for ground arrangements. And end up going absolutely nowhere."

   The special master found that this statement was "misleading" in that under the TGC regulations, "it was impossible for a prospective passenger to ever forfeit money paid to the organizer for ground arrangements." App. 7d. The challenged statement must be read as part of an advertisement, not a security prospectus. The ad does not indicate that payments for ground arrangements would be forfeited. It indicates that the possibility that deposits would be lost and that a planned vacation trip would be cancelled were "catches" of which the prospective traveler should be aware. Clearly, the statement is literally correct, and its implications were accurate in context. It would be absurd to posit a traveler unconcerned about forfeiture of his ticket deposits so long as ground arrangement deposits would be refunded.

   2. "Or find out your hotel (if you buy an optional ground package). Nobody's sure yet either."

   Four days before the ad was published, a local Western employee made a "check call" to MSAA and was told the name of a hotel that would probably be used on one of its TGC ground tours; this caller was told that the hotel was "not for sure." 18 Tr. 5-13, 28-29; Ex. CC. A similar call was placed to Mainline Travel, which was also organizing TGC's to Hawaii; the agent at Mainline "didn't know" what hotels would be used on ground tours. 18 Tr. 47-51; Ex. EE. The special master, how-

(Footnote continued on the following page)

THOSE "LOW-LOW" AIRFARES TO HAWAII. YOU CAN END UP GOING NOWHERE FOR A COUPLE OF HUNDRED DOLLARS.

Within the past few weeks, you might have seen some travel ads quoting unbelievably low prices for vacation fares to Hawaii.
No, they're not misprints. But we suggest you read the fine print. Very carefully.
They're called "Travel Group Charter" fares.
Can they save you money?
Perhaps. But you should also be aware that there are a lot of catches to these fares.
[redacted]
And it's all perfectly legal.

YOU MUST MAKE YOUR DOWN PAYMENT 90 DAYS IN ADVANCE.

Here are some things they make you do:
–You must make your reservation at least 90 days before you leave.
–You must sign a contract.
–Must deposit 25% of the estimated cost.
And some things you can't do:
–You can't select the date you want to leave. It's already set. Only Tuesdays or Wednesdays. (Which is fine if you want to start your vacation on a Tuesday or a Wednesday.)
–You can't select the day you want to come home. It's also set.
–Or pick a convenient time to leave. Try and find out when you leave. Nobody can tell you. Because nobody's sure yet.
[redacted]
–And under no conditions can you switch planes to extend your stay.

60 DAYS AHEAD YOU MUST PAY THE BALANCE.

If you still want to go, here's what else is in store:
–Two months ahead of departure, you must pay the balance of the "estimated" cost of the trip. Two full months ahead.
–45 days before you leave, you pay the final price of the trip.
–The final price could be as much as 20% more than the estimate.
–So that $130 fare can suddenly become a $258.80 fare.

CANCEL? WELL, MAYBE–

Suppose you want to cancel.
Can you? Only if:
–You're ill. And can provide certification from your doctor to prove it.

–Or your ticket can be assigned to a qualified standby applicant. (But cross your fingers because the standby list has to be established 90 days before departure.)
[redacted]
–If you miss the plane, you lose your money. Period.

45 DAYS AHEAD THEY CAN CANCEL ON YOU.

It's extremely difficult for you to cancel. But can they cancel on you? Easy.
–45 days ahead of departure, if not enough tickets have been sold, the charter operator *must* cancel the trip.
–You'll get a full refund...if that's any consolation, because you'll have to start all over with your vacation arrangements.

HOW YOUR BARGAIN CAN DISAPPEAR.

After going through all the advance planning and uncertainties, here's another way your Travel Group Charter savings can evaporate:
–If you're like 60% of the visitors to Hawaii you'll want to see more of Hawaii than just Oahu.
–Like Maui, Kauai or the big island of Hawaii.
–If you fly a Travel Group Charter, you pay full fare to each island.
–If you fly Western Airlines, you can do it for a flat $9 per island. Look.

YOU'LL PAY MORE FOR INTER-ISLAND FLIGHTS	Full Fare w/ Your Passport	Economy Fare – Available to Western Passengers
[redacted]	$42.00	$18.00
[redacted]	31.40	13.00
[redacted]	38.80	9.00

WHAT THE FINE PRINT WON'T TELL YOU.

It's a fact that:
[redacted]
–If you are on the 1 out of 10 that takes off, don't expect to do much stretching out on your flight. The seats are pretty close together.
–You can actually end up with up to 22% less legspace than you'd get on Western. Which is something to think about on an 8-hour flight.
[redacted]
And after you've weighed all the evidence, frankly, we hope you'll decide to take your Hawaiian vacation on Western Airlines.
Our tickets cost a little more, sure. But you get more, too.

TRAVEL WITH PEACE OF MIND.

When you fly Western, you can look forward to starting your vacation with:
–The peace of mind that comes from knowing that you won't lose all your money if your plans change. Just let us know and we'll be glad to change your flight reservation.
–The convenience of your choice of several departures. Every day of the week.
–The comfort of Western's famous First Class Legspace. And the spaciousness of our new DC-10 Spaceships.
–Our fabulous Islander Service. Featuring Diamond Head sparkling punch. Champagne for all adults, of course. Plus your choice of Polynesian entrees.
It's very simple. You get what you pay for.

Western Airlines
/Hawaii Master/Canada/Western USA/Mexico

Your Travel Agent knows–just say you want to fly Western. Or call us at 726-4141; visit our ticket office at 126 South Seventh Street.

[A large fold-out copy of the ad has been included in the back of this petition.]

The Eighth Circuit purported to find the competitive impact of the Western ad to be material, taken as a whole; thus, there is a finding that the public lost interest in TGCs as a result of Western's ad. 623 F.2d at 1263 & 1271-72;

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ever, found that the above statement was "false and misleading" in that "the statement was not true as of the date of the ad for ITA's TGCs." App. 7d. The ad did not mention ITA, nor did it preclude the possibility that ITA may have arranged for a hotel. The ad merely warned the consumer to check out the specifics of the arrangement under circumstances which clearly warranted the belief that the ground arrangements were being marketed without specific details being available.

3. "If you're lucky enough to get a qualified standby [as a replacement], the charter operator can charge you a 5% 'transfer fee.' "

Although CAB rules specifically permitted charter operators to charge 5% transfer fees upon cancellation, the special master found this statement "false and misleading" because by contract ITA could not have charged such a fee. App. 7d. The ad, of course, did not mention ITA in any way, nor did it state that every TGC operator would charge the 5% fee.

4. "Any later than 45 days before departure and you're virtually out of luck. If your boss switches your vacation, for example, you've had it.

The special master found that this statement was false and misleading because a full refund would still have been allowed within 45 days of departure if a substitute from the standby list could have been used. App. 7d. But the ad itself advised the reader only two sentences earlier of the possibility of obtaining a substitute from the standby list.

5. "Nationally, over 2600 Travel Group Charters have already been cancelled. That's 9 out of 10 flights that were scheduled."

The special master did not dispute the accuracy of this statement, but found that it was "misleading" since this "national experience was not representative of the Twin Cities' experience with TGCs." App. 8d. He also thought that the statement was misleading because it was not limited to cancellations occurring because of inability to attract sufficient passengers. *Id.* The special master never explained why Western had an obligation to speak only in terms of Twin City experience, or to state the precise causes of the national experience with TGC cancellations.

(Footnote continued on the following page)

App. 14a & 29a-30a. But there is no determination that the loss of interest had anything to do with the alleged "misstatements." The Court of Appeals apparently did not believe that such a finding was necessary. For all that appears, the ad was effective because the public agreed with Western that TGCs were not all that attractive in view of the regulatory drawbacks.

The district court also found — on evidence so flimsy that it does not even meet the substantial evidence test — that Western leveraged its power in the market for Minneapolis-Las Vegas tickets to discourage one Minnesota travel agent (MSAA) from doing TGC business. App. 11d-12d. As shown below, this finding does not provide an independent basis to sustain the result below. The Eighth Circuit's affirmance of this holding, however, involved a clear denial of appellate review because there was no evidence to support the district court's finding.

Proceedings Below

On May 21, 1974, ITA filed its complaint pursuant to §§ 1 and 2 of the Sherman Act, 15 U.S.C.§§ 1 & 2, and § 4 of the Clayton Act, 15 U.S.C. § 15. The case was originally tried

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6. "GET YOUR TRAVEL AGENT'S ADVICE"

"As a professional, your travel agent can best advise you about your vacation plans. He understands all the pros and cons of Travel Group Charters."

The special master found that this statement was also "misleading" since at the time of the ad "travel agents did not know much about the TGC concept" and because Western had sent letters to local travel agents attacking TGCs. App. 7d. The Eighth Circuit held that it was irrelevant whether travel agents knew the pros and cons of TGCs; what was important to that court was the fact that Western was directing consumers to travel agents while trying to persuade such agents to book their customers on Western. 623 F.2d at 1264; App. 14a-15a. The privilege of a firm to promote consumer confidence in the expertise of its distributors, however, is well-established. ITA itself encouraged travelers to see their travel agents regarding TGCs. 11 Tr. 149-150. The public could hardly have been "misled" by the ad. It was *clear* that Western was encouraging use of Western's services instead of TGCs, and any sensible reader would have known that Western would be recommending inquiry with travel agents because Western expected the answers to be favorable to Western.

to a jury before a magistrate and a verdict was returned in ITA's favor on August 4, 1977. On February 22, 1978, the district court ordered a new trial on the ground that the magistrate could not lawfully preside over the jury trial. The parties waived jury, and the district court appointed the magistrate to be special master for trial of the issues, pursuant to 28 U.S.C. § 636(b)(2). The case was submitted to the special master on the prior record, augmented with additional evidence.

On June 7, 1978, the special master filed his findings of fact, conclusions of law and recommended order for judgment. The special master concluded that Western and its advertising agency had combined and conspired in restraint of trade "by knowingly and actively participating in a course of anticompetitive conduct." App. 19d. He also concluded that Western had attempted to monopolize and had monopolized individually ticketed air transportation on the Twin Cities/Hawaii route in violation of § 2 of the Sherman Act. App. 20d. Accordingly, the special master recommended that judgment of $361,596 be entered against Western, together with interest and attorneys' fees. App. 21d. On October 17, 1978, the district court adopted the special master's findings of fact, with the exception of one finding that is irrelevant to this petition, and accepted the special master's recommendation for judgment. App. 1c-2c.

The Court of Appeals affirmed in most respects.[4] It held that Western's anti-TGC campaign consisting of the newspaper ad, the radio commercial encouraging listeners to read the ad and the pre-advertisement letters to travel agents amounted to an unreasonable restraint of trade. 623 F.2d at 1266-68; App 19a-24a. According to the court, the participation of Western's advertising agency in formulating the advertising campaign satisfied the "contract, combination or conspiracy" requirement of § 1 of the Sher-

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4. Although the Court of Appeals affirmed the district court's judgment as to liability and damages, it reduced the district court's award of attorneys' fees against Western by $25,000 and limited the contingency fee that respondent would otherwise have owed its counsel. 623 F.2d at 1273-78; App. 33a-43a.

man Act, even though the agency "acted only as an agent providing technical services to Western." *Id.* at 1265-66; App. 16a-19a. Having fabricated a conspiracy, the court went on to hold that, although the advertising campaign was "not a conventional 'restraint of trade' " and was, "in fact, a form of competition," such competition was unreasonable because it was "not fair competition," because it was done with "the purpose of preventing any effective competition from ITA's TGCs," and because of the "tremendous effect of Western's campaign." *Id.* at 1267-68; App. 21a-24a.

The court paid no attention to Western's argument that any error in the advertisement had not been intentional, and that antitrust liability cannot be based on unintended inaccuracies. The only treatment of this point was the court's morbid concern with the fact that Western intended the ad to prevent TGCs from becoming a competitive threat. *Id.* at 1268; App. 23a. Likewise, the Court of Appeals gave no consideration to the serious issue of antitrust causation raised by its own faulty analysis. It wholly ignored the likely prospect that the general impact found by the district court was the natural result of the fact that Western's ad disclosed actual problems with TGC arrangements of which the public had been unaware prior to that ad.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted in this case because of the unprecedented declaration of a virtual *per se* rule against competition by advertising. A firm that is considering advertising must hereafter fear the likelihood that a competitor will bring and win a treble damage action if it publishes an effective advertisement. All that is needed to support such a claim under the decision below is ordinary competitive intent and some minor inaccuracy.

What the Court of Appeals did is dramatically evident in the advice a lawyer must now give a client thinking of publishing an ad:

1. Never use an advertising agency — that could be found to involve you in a conspiracy under the antitrust laws;

2. Avoid advertising facts about your competitor's product — some judge or jury may find that your statements leave an ambiguity that you were required to dispel;

3. Avoid directing your advertisements at consumers — that might be held an unlawful "frontal attack";

4. Do not follow up on your ads with distributors — that could make the ad unlawful as part of a "course of conduct";

5. Do not advertise if anyone in your employ has written in internal correspondence about the importance of responding to competition — that could show an undue intent to prevail; and

6. Safest of all, don't do comparative advertising.

In its effect on competition, the decision below is a repudiation of the Sherman Act and its purpose. It ought to be expunged.

The Sherman Act was designed to be a comprehensive charter of "free and unfettered competition." *Northern Pac. Ry. Co. v. United States,* 356 U.S. 1, 4 (1958). "It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources." *Id.* It is not concerned with individual competitors, nor does it immunize a new competitor or a new form of competition from vigorous scrutiny in the marketplace. The Sherman Act invariably counsels every firm to compete vigorously, all the time.

Advertising, especially when it seeks to communicate relevant facts to the public, is a healthy and constructive means of competition. It "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona,* 433 U.S. 350, 364 (1977). It is the very nature of advertising, moreover, to advocate the sponsor's interest vividly. In the Sherman Act theory of unfettered competition, the market is left to judge whether an ad is overstated or in bad taste.

This is not to say that the content of advertisements is beyond inquiry. State law rules against unfair competition provide enforceable restrictions on an advertiser's latitude. The fact that a practice requires regulation does not, however, make that practice a proper topic for Sherman Act concern. Quite the opposite in this case — the basic purpose of laws against unfair competition is to impose restrictions on the range of competitive endeavor. The basic purpose of the Sherman Act is to prevent restrictions on competition. These purposes are divergent. *Northwest Power Prods., Inc. v. Omark Industries, Inc.*, 576 F.2d 83, 88 (5th Cir. 1978).[5] The practical consequence of this divergence is to allocate to the state courts a responsibility which the federal courts are not funded or staffed to administer.

Certiorari is also warranted in this case because the Eighth Circuit's decision virtually nullifies the requirement under § 1 of a "contract, combination or conspiracy." The Sherman Act is concerned with economically-relevant "combinations." It is not preoccupied with simplistic literalism. *Broadcast Music Inc. v. CBS*, 441 U.S. 1, 9 (1979). Yet, it is charitable to call the decision below simplistic in its treatment of advertising agency services. A "trust" does not exist merely because a firm contracts to have services rendered for a fee by a specialized agency. To sustain such a decision is fundamentally restrictive of those service organizations that promote efficiency and effective competition by supplying industrial firms with specialized services they are not well advised to provide internally. The use of independent agencies does not change the economic effect of the sponsor's advertising conduct, and therefore the use of such agencies is irrelevant to § 1 considerations.

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5. Case histories are not included in the text of this petition unless germane to the discussion. Full case histories appear in the table of authorities.

I. THE COURT OF APPEALS' OPINION THREATENS THE PRIMARY GOAL OF THE SHERMAN ACT BECAUSE IT CONDEMNS LEGITIMATE COMPETITION SOLELY BECAUSE IT WAS AGGRESSIVE.

Despite appearances, the Court of Appeals did not hold that Western had violated the Sherman Act because its TGC advertisement was inaccurate. The label of "false advertising" is a red herring in this case.

Western was condemned because it meant to compete with TGCs too effectively for the sensibilities of the Eighth Circuit panel. According to the Court of Appeals, the "crux" of its holding was "the purpose of the anti-TGC campaign." The Eighth Circuit thought that unreasonableness was "clear" because Western's ad had "tremendous effect." 623 F.2d at 1268; App 24a. In short, Western's actions violated the Sherman Act because they supposedly went "to the jugular" rather than "one of the lesser arteries." *Id.* But competition on the merits does not exclude going for the jugular, especially where the "jugular" consists of nothing more than the inability to withstand public scrutiny of the facts. "It is the very nature of competition that the vigorous efficient firm will drive out less efficient firms." *Janich Bros. Inc. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977).

The Court of Appeals' preoccupation with limiting the vigor of advertising competition is plain from the fact that the court found it "unfruitful, and additionally unnecessary, to examine individually the seven allegedly false, deceptive or misleading statements." 623 F.2d at 1263; App. 14a. The issues of concern to the court were "first, whether the ad as a whole, contributed to the 'anti-TGC campaign,' and second, whether the campaign constituted an unreasonable restraint of trade under Section 1 of the Sherman Act." *Id.*

The seven statements criticized by the special master were deemed relevant by the Eighth Circuit only to the extent that they reflected "the personality of the ad as a whole." *Id.* at 1264; App. 14a. Thus, for example, the

Eighth Circuit was not concerned with the literal truth of the statement that the travel agent "understands all the pros and cons of Travel Group Charters"; "[w]hat is most important" is that Western was attempting to win business for itself and away from the TGCs through the standard marketing practice of encouraging the public to deal with distributors Western expected to be supportive of its services. *Id.*; App. 14a-15a. It was this practice, not falsity, that concerned the Eighth Circuit.

The purpose of the Sherman Act is "to promote the most vigorous competition possible." *Southland Reship, Inc. v. Flegel,* 401 F. Supp. 339, 347 (N.D. Ga. 1975). Indeed, the Eighth Circuit seems to have recognized, if only momentarily, that advertising is a means of competition not to be condemned under the antitrust laws. 623 F.2d at 1267; App. 22a. But the Court of Appeals then went on to conclude that competition is a violation of the antitrust laws where the purpose is to win out too successfully in the marketplace. Apparently there can be a Bull Run in the competitive fray, but woe to the firm that sets out to win a Gettysburg. This fastidious distinction has no basis in the Sherman Act, and conflicts with numerous rulings of this Court and the other federal courts.

It is virtually impossible to distinguish the intention to compete from the intention "to prevent TGCs from becoming a competitive threat." The intention to prevail is inevitably "exclusionary" — it is the nature of competition to strive for all of the available business. *See, General Communications Engineering, Inc. v. Motorola Communications & Electronics, Inc.,* 421 F. Supp. 274, 286 (N.D. Cal. 1976); *Mar Food Corp. v. Doane,* 405 F. Supp. 730, 731 (N.D. Ill. 1975). In a competitive world, a seller cannot be certain how successful his efforts will be, and cannot afford the luxury of conceding business to his rivals. Thus, as the Ninth Circuit said in a recent case, "the very essence of a competitive marketplace . . . is to prevail against all competitors." *Blair Foods, Inc. v. Ranchers Cotton Oil,* 610 F.2d 665, 670 (9th Cir. 1980).

Furthermore, motive has no relevance under the Sherman Act unless it results in actions that are unreasonable restraints of trade. "[T]he Sherman Act permits a

person to have an intent to exclude another from the market if this intent is accomplished without resort to predatory or unfair practices." *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125, 144 (D. Mass. 1959). *See, Dahl Inc., v. Roy Cooper Co.*, 448 F.2d 17, 19 (9th Cir. 1971). The reason that motive has only this qualified relevance is obvious: "an antitrust policy divorced from market considerations would lack any objective benchmarks." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977). Motive, except as it results in actions, is divorced from market considerations; and conversely, healthy competitive acts have exactly the same market significance regardless of the private intent of the actor.

Whatever Western's subjective intent may have been, the only manifestation of that intent in the marketplace was the use of a vigorous advertising campaign. There is no room for dispute that such campaigns are a part of the free play of competitive forces and are protected and not to be curtailed under Sherman Act policy. *Cf. Bates v. State Bar of Arizona, supra; United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961) (holding an agreement *not* to advertise to be a violation of the Sherman Act).

Accordingly, the Eighth Circuit's decision is at war with the purpose of the Sherman Act when it substitutes criticism of Western's intent for analysis of the objective character of Western's conduct.

II. AS COURTS IN NUMEROUS OTHER CIRCUITS HAVE RECOGNIZED, THE SHERMAN ACT IS NOT SUITED TO REGULATE GARDEN VARIETY FALSE ADVERTISING CLAIMS.

The Court of Appeals did use the words "false, misleading and deceptive" advertising in characterizing Western's TGC campaign as an unreasonable restraint of trade. 623 F.2d at 1268; App. 23a. As shown, however, the court plainly used the words false, misleading and deceptive in an unconventional way because it found falsity and deception pursuant to an approach that considered examination of the truth of the statements "unfruitful" and "unnecessary." Even if the court's decision were somehow taken

to imply a ruling based on falsity of the content of the Western ad, however, imposing treble damage liability for an unintended inaccuracy in a single ad is itself obnoxious to the purpose of the Sherman Act.

Until this decision, no case has imposed a Sherman Act duty to guarantee the accuracy of advertising copy. And for good reason. Such a doctrine would chill competitive advertising and commit the federal courts to the court-congesting task of creating a federal common law of commercial disparagement contrary to the will of Congress.[6]

This case, moreover, is an especially inappropriate vehicle for introduction of such a novel doctrine. Although one statement in Western's TGC ad was inaccurate, the other six statements criticized by the district court were clearly accurate, even if open to response or clarification. Moreover, the one inaccuracy was unintentional, and was so treated in the Eighth Circuit's opinion. Equally bizarre, no finding of commercial or antitrust materiality was made as to those portions of the Western ad held to be inaccurate or misleading. If Sherman Act liability exists for the defects of Western's ad in this case, few, if any, advertisements are not Sherman Act violations.

A. Routine False Advertising Claims Are Not Actionable Under The Sherman Act.

Prior courts have recognized that regulation of advertising copy is a treacherous undertaking under the Sherman Act. The purpose of the Act is to foster competition, and advertising is one means of competing. This is especially true of competitive advertising that helps consumers to obtain information "relevant and useful in making an informed choice between competing products." FTC News Release 1-03-20 (March 30, 1972). The sanction of treble

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6. The awesome penalty of treble damages also threatens overdeterrence of constructive and constitutionally protected commercial speech. *Eastern R. Conf. v. Noerr Motors,* 365 U.S. 127 (1961). *See Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* ..... U.S. ....., 100 S. Ct. 2343 (1980); *Bates v. State Bar, supra; Virginia Pharmacy Bd. vs. Virginia Consumer Council,* 425 U.S. 748 (1976).

damages available under the antitrust laws is brutally severe, and is intended to create a strong deterrent to conduct which might give rise to such damages. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968). Because of that nuclear deterrence, courts "must always be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979). Since the line between illegitimate and customary salesmanship is inevitably a hazy one, Sherman Act regulation of advertising practices runs a disproportionate "risk of overbreadth, encompassing conduct which fosters competition; of weakening, through making available sanctions which may in practice be avoided, the deterrent effect of the antitrust laws; of subjecting defendants to captious resort to treble damage suits, with evaluation of subjective intent being the chief determinant, and varying from jury to jury." *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 560 (1st Cir. 1974).

Thus, courts have generally agreed that false advertising claims are not the stuff of antitrust, even where *intentional* disparagement of a competitor is present. Several courts have ruled that fraudulent misrepresentations, without more, *cannot* present a claim under § 1 of the Sherman Act. *See, e.g., Hill v. A-T-O, Inc.*, 535 F.2d 1349, 1355-56 (2d Cir. 1976); *Oak Distributing Co. v. Miller Brewing Co.*, 370 F. Supp, 889, 898 (E.D. Mich 1973); *Black & Yates, Inc. v. Mahogany Ass'n*, 34 F. Supp. 450, 456 (D. Del. 1940), *rev'd on other grounds*, 129 F.2d 227 (3d Cir. 1941). Other courts have been willing to assume that intentionally fraudulent and unfair competitive tactics *might* constitute violations of the Sherman Act, but only if extraordinary circumstances were present. *See, e.g., Berkey Photo Inc., supra*, 603 F.2d at 287-88; *Northwest Power Products, supra*, 576 F.2d at 86-90; *George R. Whitten, supra*, 508 F.2d at 555-560. In every case, moreover, courts have recognized that the standards of "salesmanship" prevailing in the marketplace establish a baseline which must be exceeded before it is appropriate even to consider possible antitrust liability. *General Communications Engineering, supra*, 421 F. Supp. at 289-90.

The decision here is at odds with all of the foregoing precedent. Not only did the Eighth Circuit turn a single ad containing a single unintended error into a "restraint of trade," but it ignored the fact that Western's sales puffery was consistent with the ethic of the market involved.[7] In this light, Western's ad was, at worst, no more than "seller's talk," a form of exaggeration that is, itself, a part of competition. Thus, as to nature, extent and circumstances, the *per se* rule fixed below is at odds with existing Sherman Act authority.

Even if the Court of Appeals believed that Western should be held liable for any damages arising from unintentional inaccuracies in its ads, it was mistaken in using the Sherman Act for this purpose. As this Court has often warned, the Sherman Act "does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945). *See also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512 (1940). The Act was intended for "the protection of *competition*, not *competitors*." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). It was never meant to address " 'garden variety' competitive business torts." *George R. Whitten, supra*, 508 F.2d at 560. *See, Laurie Visual Etudes, Inc. v. Chesebrough-Pond's, Inc.*, 473 F. Supp. 951, 959-60 (S.D.N.Y. 1979).

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7. The Western ad certainly went no further in overstating the problems with TGCs than the ITA ads went in disguising those problems. *See* p. 6, *supra*. The practice of the marketplace is an indispensable antitrust consideration because the antitrust laws are not designed to impose a standard of scrupulous accuracy, but rather to interdict conduct that goes so far beyond market custom so as to become a restraint on the *opportunity* to compete. See 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 738d, at pp. 280-81 (1978). The contention that an arguable overstatement in an ad goes beyond mere tit-for-tat competition has no substance where overstatement is common to all advertising in the relevant market. This was the relevance of Western's proof concerning the inaccuracy of ITA's ads. The Court of appeals distorted the antitrust laws by failing to recognize this distinction. *Compare Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 586-87 (1st Cir. 1960) *with* 623 F.2d at 1262 n. 10; App. 11a-12a n. 10.

Injury that may be suffered as a result of advertising inaccuracies can be remedied by state common law of commercial disparagement. Awarding treble damages intrudes into an area that Congress has chosen to leave to the states.[8] "The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress." *Hunt v. Crumboch, supra,* 325 U.S. at 826, quoting *Apex Hosiery Co., supra,* 310 U.S. at 513. This principal is especially applicable here because "the purposes of the antitrust law and unfair competition law generally conflict. The thrust of antitrust law is to prevent restraints on competition. Unfair competition is still competition and the purpose of the law of unfair competition is to impose restraints on that competition." *Northwest Power Products, supra,* 576 F.2d at 88.

B. The Eighth Circuit's Decision Is In Square Conflict With The Second Circuit's Decision In Berkey Photo, Inc. v. Eastman Kodak Co.

The issue of when inaccuracies in advertising might constitute a violation of the Sherman Act was thoughtfully decided by the Second Circuit in *Berkey Photo Inc. v. Eastman Kodak Co., supra.* In *Berkey,* the defendant's monopoly power was undoubted, and the scope of its advertising campaign far greater than the single ad at issue here. The plaintiff argued that Kodak violated §2 of the Sherman Act because it misrepresented its products to the market. Although the applicable antitrust standard had to be at least as stringent as any standard applicable to Western, the *Berkey* court rejected the claim that mere inaccuracy could justify a treble damage award under the Sherman Act. "[I]n its advertising, a producer is ordinarly

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8. Although the Federal Trade Commission has the power to correct "unfair or deceptive acts or practices," 15 U.S.C. § 45(a)(1), Congress has resisted attempts to provide for a parallel private action for damages. Callman, *Unfair Competition, Trademarks & Monopolies,* § 43 at pp. 137-42 (3d ed 1967).

permitted, much like an advocate at law, to bathe his cause in the best light possible." 603 F.2d at 287. Thus, Kodak had not violated the antitrust law because, being aware that its 110 camera had substantial "red-eye" problems, it decided to avoid disclosure of this weakness by assuring that there was "enough ambient light for exposure without flash" at its press conference announcing the camera. *Id.* at 287-88 n.40. Although this tactic was at least as "misleading" as Western's ad in this case, it was not *restrictive* of competition. "Advertising that emphasizes a product's strengths and minimizes its weaknesses does not, at least unless it amounts to deception, constitute anticompetitive conduct violative of § 2." *Id.* at 287-88.

The Second Circuit went on to hold that even an outright misrepresentation did not trigger Sherman Act liability:

> "There was evidence that Kodak indicated on the boxes in which Kodacolor II was sold that the film had a shelf life of 14 months, whereas in fact the film lost half its speed within three to six months. We need not decide whether this action amounted to deceptive advertising, or whether and under what circumstances such deception might amount to a violation of § 2. *See* 3 P. Areeda & D. Turner, *supra,* at 278-79. The Sherman Act is not a panacea for all evils that may infect business life. Before we would allow misrepresentation to buyers to be the basis of a competitor's treble damage action under § 2, we would at least require the plaintiff to overcome a presumption that the effect on competition of such a practice was *de minimis* . . ." *Id.* at 288 n.41.

The Eighth Circuit's decision in this case is in total conflict with the decision in *Berkey.* Consistent with generations of Sherman Act precedent, the Second Circuit refused to protect an unhappy competitor from the natural consequences of effective advertising. Although Kodak's labelling was literally untrue in at least one respect, the Second Circuit recognized a strong presumption against antitrust

relevance of such misstatements.[9] If the inaccuracy had relevance, it had to be under state law principles. In contrast, the Eighth Circuit strained to find "misrepresentations" in the Western ad, "misrepresentations" consisting almost entirely in the fact that the ad sought to bathe Western "in the best light possible." The court ignored materiality; it ignored inadvertence; its guiding consideration was the fact that Western sought to compete too earnestly. As the Fifth Circuit said in *Northwest Power Products, supra,* such a holding itself restrains competition.

C. The Court of Appeals' Failure To Consider The Materiality Of The Alleged Inaccuracies Subverts This Court's Decision In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.

This Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* forestalled an emerging misuse of the treble damage remedy. In *Brunswick,* the Court emphasized that treble damages are recoverable only for antitrust injury (*i.e.*, injury caused by a suppression of competition) and not for competitive injury (*i.e.*, business lost as a natural result of the competitive process). 429 U.S. at 486-89. The antitrust laws never entitle a firm to be immune from the public-serving rigors of the competitive process. *Id.* The decision of the court below repudiates *Brunswick,* and awards ITA three times the profits that it could have realized if there had been no competition whatsoever from Western or any other source.

There is not the slightest suggestion in the Eighth Circuit's decision that the alleged "misrepresentations" in Western's ad produced injury to ITA. The court found that the ad, *as a whole,* was material to the fall-off in traveler interest in TGCs, but there was *no* evidence that the mistaken statement — that all prior TGCs from the Twin Cities to Hawaii had to be cancelled — had a material

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9. The Second Circuit clearly did not hold that Kodak's campaign on the whole had *de minimis* effect. 603 F.2d at 287.

effect. There hardly could have been. Advertisements for Hawaii TGCs appeared adjacent to Western's ad; no reader could have been seriously confused about the existence of active TGC filings. Nor was there any evidence that any of the other six statements criticized by the district court had a material effect on TGC patronage. Thus, although the Eighth Circuit found that Western's ad was highly effective competition, there was no evidence that the alleged falsity of the ad was the source of any loss of trade whatsoever.[10] This treatment is not surprising in view of the lower court's belief that the ad was actionable not because of inaccuracies, but because it was a "frontal assault" on TGCs. The anti-competitive implications of such a holding, however, represent a "frontal assault" on *Brunswick*.

III. THE EIGHTH CIRCUIT'S HOLDING THAT THE USE OF AN ADVERTISING AGENCY IS A "CONTRACT, COMBINATION OR CONSPIRACY" UNDER § 1 WILL PRODUCE ABSURD RESULTS AND CONFLICTS WITH DECISIONS IN OTHER CIRCUITS.

Section 1 of the Sherman Act applies only to "contracts, combinations or conspiracies." Unilateral conduct is not its concern. The Court of Appeals found the "conspiracy" requisite to invocation of § 1 in the simple participation of an advertising agency in the preparation of Western's TGC advertising campaign. Citing this Court's opinion in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), the Eighth Circuit held that there was the requisite economic "combination" of actors because the ad agency "materially aided" in the campaign, and knew that its purpose was to enable Western to prevail in competition against TGC operators. 623 F.2d at 1266; App. 18a-19a. This holding, far

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10. As noted by the Court of Appeals, Western's publication of a similar ad on the West coast was as effective as the Twin Cities ad. 623 F.2d at 1260; App. 8a. Yet the West coast ad had not contained the one factual error in the Twin Cities ad nor most of the other statements criticized by the special master. Ex. 53.

from being controlled by *Albrecht,* turns *Albrecht* into an embarrassment and conflicts with the decisions of numerous circuit and district courts.

The requirement of a "conspiracy" under § 1 is not a meaningless appendage. Congress did not intend to restrict actions of a single firm, whether carried out internally or through outside agents, but to proscribe those conspiracies between firms "where the element of collaboration *itself* presents a special threat to competition." *State of Arizona v. Cook Paint & Varnish Co.,* 391 F. Supp. 962, 969 (D. Ariz. 1975), *aff'd,* 541 F.2d 226 (9th Cir. 1976).[11] *See, Fuchs Sugars & Syrups, Inc. v. Amstar Corp.,* 602 F.2d 1025, 1030 (2d Cir. 1979). The fact that a firm uses outside agents is irrelevant for Sherman Act purposes except where the collaboration itself has anticompetitive effects. *Harold Friedman, Inc. v. Kroger Co.,* 581 F.2d 1068, 1072-79 (3d Cir. 1978).

The Eighth Circuit's decision ignores the relevance of the "conspiracy" requirement and extends § 1 to virtually every activity where a firm uses services of an outside agency to perform tasks that it might do internally. Nothing in the relationship between an advertiser and an advertising agency justifies assessing antitrust damages for use of an advertising agency. The economic consequences of using an agency or using "in-house" advertising technicians are identical.

The rule created by the court below, moreover, is an artificial restraint of trade because it creates a deterrent to use of advertising agencies. Since the option to use advertising agencies enhances the range of competition, there is no doubt that the Eighth Circuit's restriction on the use of ad agencies is unreasonable. To a very large extent, effective use of advertising media depends on judicious use of advertising agencies. Advertising agencies clearly offer many firms a more efficient means of employing specialized talent and expertise to maximize the competitive success of their investments in advertising, and for some firms use of such agencies is likely to be essential to

11. Emphasis supplied in all quotations unless otherwise noted.

remaining competitive in the contest for the "hearts and minds" of consumers.[12]

This Court's decision in *Albrecht* does not support such an absurd result. In *Albrecht,* the Herald Company threatened to take over Albrecht's newspaper route unless Albrecht agreed to sell his papers at the Herald's suggested retail price. When Albrecht refused, the Herald hired Milne Circulation Sales to solicit subscriptions from Albrecht's customers at the suggested price and then entered into an agreement with George Kroner to deliver papers that Milne lured away. Several factors supported this Court's findings of a "conspiracy in restraint of trade," especially the fact that the agreement between the Herald and Kroner directly restrained trade in that the agreement itself set a fixed price. Further, Kroner's profit was directly related to enforcement of the restraint. *Harold Friedman, supra,* 581 F.2d at 1073.

According to the Third Circuit in *Harold Friedman,* Milne's solicitation of customers on behalf of the Herald would not by itself have met the "conspiracy" requirement. *Id.* at 1073-74. Milne, unlike Kroner, did not benefit directly from the restraint of trade. "Its only purpose was to earn its solicitation fee." *Id.* at 1073 n.7. Moreover, Milne by soliciting customers "was merely performing its normal business function, and although that function facilitated the restraint of trade, it did not restrain trade." *Id.* at 1073. Where the party allegedly acting in concert with the defendants does not have a direct interest in restraining trade and enters into agreements that do not themselves restrain trade but merely facilitate a restraint of trade, there is no § 1 conspiracy. *Id.* at 1078-79.

Here, Western's advertising agency, like Milne, did not itself restrain trade in any way. At most, the advertising agency "facilitated the restraint of trade" by "performing its normal business function." Moreover, the agency's

12. The adverse implications of the Eighth Circuit's decision are not limited to the use of advertising agents. Under the Court of Appeals' opinion, a firm must integrate with every management consultant, accountant, lawyer, commission broker and other outside agent that it uses to avoid the risk of § 1 liability.

"only purpose was to earn its [advertising] fee"; the ad agency did not stand to gain directly from any increase in the volume of Western's business. Under the Third Circuit's decision in *Harold Friedman,* therefore, no Albrecht "conspiracy" existed.

The Eighth Circuit's decision is also in conflict with the holdings of numerous other federal courts. Although federal courts have been neither clear nor perfectly consistent in their interpretation of *Albrecht,* they have repeatedly recognized that a corporation cannot "conspire" with its agent for § 1 purposes if the agent merely performs a commercial function and the element of collaboration *itself* has no anticompetitive effects. *See, e.g., Golden v. Kentile Floors, Inc.,* 475 F.2d 288, 290 (5th Cir. 1973); *Austin v. House of Vision, Inc.,* 404 F.2d 401, 403 (7th Cir. 1968); *Realco Services, Inc. v. Holt,* 479 F. Supp. 880, 885 (E.D. Pa. 1979); *National Tire Wholesale, Inc. v. Washington Post Co.,* 441 F. Supp. 81, 87 (D.D.C. 1977), *aff'd,* 595 F.2d 888 (D.C. Cir. 1979); *Diehl & Sons, Inc. v. International Harvester Co.,* 426 F. Supp. 110, 117 (E.D.N.Y. 1976). *See generally* Harrington, *The Bathtub Overflows: Conspiracy with Advertising Agents, Management Consultants, Commission Brokers and Other 'Outside' Agencies Under Section 1 of the Sherman Act,* 22 Antitrust Bull. 741 (1977).

IV. THE MARKET LEVERAGE ISSUE DOES NOT SUPPORT THE JUDGMENT AND SHOULD NOT BE LEFT STANDING.

The Court of Appeals held, *inter alia,* that Western had used leverage that it had in the Minneapolis-Las Vegas market to discourage a single Minneapolis travel agent (MSAA) from promoting TGCs to other cities. If the judgment could be supported by this holding alone, *certiorari* might not be appropriate. In fact, however, the judgment below cannot possibly be sustained on the market leverage holding alone. This is clear from the section of the Eighth Circuit's opinion upholding the damage award. Again and again, the court repeats that the impact of the Western ad was the core of the damage finding. *E.g.,* 623 F.2d at 1270 & 1272-73; App. 27a & 30a-33a. Nowhere is there a

holding that the supposed leverage, by itself, would have produced the full damage award granted by the district court. On the contrary, the Eighth Circuit held that the ad and its effect were "enveloped within the section 2 claim" and that "the overall effect [of the ad] on TGCs was one of the reasons that led MSAA to cancel its participation in the ITA TGC program." 623 F.2d at 1272 & 1273; App. 30a & 33a.

The Eighth Circuit's decision on market leverage, moreover, was an abandonment of an appellate court's obligation to protect a defendant's right to a fair trial. According to the special master's findings, "statements and conduct" of a Western representative at a September 25, 1973 meeting that MSAA had demanded "forced MSAA to recognize" that Western could reduce a favorable allocation of cut-rate tickets for Las Vegas that MSAA had been receiving. App. 11d-12d. Had the Court of Appeals examined the uncontradicted record, however, it would have found that there were no "statements or conduct" at the September 25 meeting that could subject Western to liability for use of market leverage. MSAA representatives, not Western, raised Las Vegas as a topic at the meeting; MSAA reminded Western that Western stood to lose MSAA as a fertile source of Las Vegas traffic if Western were to aggravate MSAA. 11 Tr. 77-78, 83, 185. There was *no* evidence to support the claim that Western threatened, either openly or through a "veil," to use its potential Las Vegas tickets to discourage participation in TGCs, and the Eighth Circuit acknowledged as much. 623 F.2d at 1269-70; App. 26a.

Although there was a total failure of proof, the Eighth Circuit affirmed the special master's findings, noting vacuously that it was not its "function to try this case *de novo*." 623 F.2d at 1270; App. 27a. In so doing, the Eighth Circuit shirked its responsibility, reemphasized only last year by this Court, to review and set aside findings that are clearly erroneous. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 534 n.8 (1979). The Eighth Circuit had "not only the power to set aside findings of fact that are clearly erroneous, . . . but the duty to do so. The finder of fact is entitled to respect but not to a patent of infallibility." *United*

States v. Cruz, 581 F.2d 535, 541 (5th Cir. 1978) (*en banc*). If the Court takes this case and reverses, the market leverage issue should be remanded for serious consideration on the merits in order to cure this miscarriage of justice.

V. CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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October 21, 1980

80-668

Supreme Court, U. S.
FILED
OCT 21 1980
MICHAEL RODAK, JR., CLERK

No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTERN AIR LINES, INC.

Petitioner,

vs.

INTERNATIONAL TRAVEL ARRANGERS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

INTERNATIONAL TRAVEL ARRANGERS, INC.,
Appellee,

v.

WESTERN AIRLINES, INC., Appellant.

No. 79-1221.

United States Court of Appeals,
Eighth Circuit.

Submitted Jan. 15, 1980.

Decided June 10, 1980.

Appeal from the United States District Court for the District of Minnesota.

Before STEPHENSON and McMILLIAN, Circuit Judges, and THOMAS,* District Judge.

STEPHENSON, Circuit Judge.

Plaintiff-appellee, International Travel Arrangers, Inc. (ITA), a Minnesota corporation, organizes and arranges travel charter flights. Defendant-appellant, Western Airlines, Inc., is a regularly-scheduled aircraft carrier with routes including Minneapolis-St. Paul/other mainland cities to Hawaii; Minneapolis-St. Paul to Las Vegas; and various western states' cities to Mexico.

The district court,** adopting the conclusions and recommendations of the United States magistrate acting as a

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* The Honorable Daniel H. Thomas, Senior Judge for the United States District Court for the Southern District of Alabama, sitting by designation.

** The Honorable Miles W. Lord, United States District Judge for the District of Minnesota.

Special Master,[1] found that Western violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and entered judgment of trebled damages of $361,596.00 ($120,537.00 × 3) against Western and attorneys' fees and costs, of $213,390.87 and $10,771.40, respectively, to ITA.

Western, on appeal, challenges as clearly erroneous the findings of the Sherman Act violations, and challenges as excessive the amount of attorneys' fees. We affirm the district court's findings of Sherman Act violations and the damages resulting therefrom; we reduce the amount of attorneys' fees to $161,003.75.

Generally, ITA alleged at trial that Western, through a combination with its advertising agency, Batten, Barton, Durstine and Osborn,[2] (BBD&O) conducted a campaign aimed at preventing ITA's development of travel group charters (TGCs) from becoming a competitive threat to

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1. On July 8, 1977, the parties stipulated that the case would be tried by a jury presided over by United States Magistrate Robert G. Renner, and the district court ordered such. The trial proceeded on this basis. The jury returned a verdict in favor of ITA in the sum of $139,000. On February 22, 1978, a new trial was granted by the district court on the basis that a jury trial presided over by a United States magistrate was improper. The parties then stipulated to a retrial by Magistrate Renner acting as a Special Master pursuant to 28 U.S.C. § 636(b)(2) and Fed.R.Civ.P. 53. The stipulation and order thereon provided that the evidentiary proceedings and the jury trial would be deemed to be the proceedings before the Special Master.

   On April 24, 1978, the transcript and documentary evidence of the jury trial, along with some additional testimony and exhibits, were offered and received. On June 7, 1978, the Special Master reported Findings of Fact, Conclusions of Law, and a Recommended Order for Judgment. On October 17, 1978, the district court adopted all but one finding of the Special Master and ordered judgment to be entered against Western.

   On November 6, 1978, a separate hearing was held before the Special Master to determine attorneys' fees and costs. Judgment was entered by the district court on February 26, 1979, against Western in regard to fees and costs.

2. The individual names in BBD&O have been spelled interchangeably as Batton; Barston; Dirsten & Dursten; & Osborne. We have spelled the names as they appear on a BBD&O letterhead.

Western; that Western, by use of its monopoly power, further attempted to prevent ITA's program of TGCs from becoming a competitive threat; and that Western succeeded in its activities, thereby causing damage to ITA.

Western challenges as clearly erroneous the Special Master's findings with respect to most of these factual allegations, and further specifically argues that the finding of a causal relationship between such alleged activities and ITA's alleged damages was clearly erroneous.

We shall review most of these claims in conjunction with a thorough review of the facts of this case. As a preliminary matter, however, we shall address Western's claim that the dispute between Western and ITA should initially have been referred to the Civil Aeronautics Board (CAB) under the doctrine of primary jurisdiction.

I. Primary Jurisdiction

The CAB has both exclusive jurisdiction and primary jurisdiction over a variety of disputes within the air transportation system. The district court[3] addressed the issue of jurisdiction with respect to the instant case, *International Travel Arrangers v. Western Air Lines, Inc.*, 408 F.Supp. 431 (D.Minn.1975), and found that the federal district court had jurisdiction of the dispute and denied Western's motions to dismiss or to refer the matter to the CAB.

On appeal, Western argues that the CAB had primary jurisdiction over the case under (1) 49 U.S.C. §§ 1302, 1381 (§ 1302 amended 1978) and 14 C.F.R. § 399.80; (2) 49 U.S.C. § 1482 (amended 1977 and 1978) and 14 C.F.R. § 302, inasmuch as the dispute concerned allegedly unfair competitive practices.

49 U.S.C. §1302 (amended 1978) defines the matters of public interest which the CAB must consider in performance of its powers and duties. 49 U.S.C. § 1302(c) (amended 1978) specifically mentions that one of these considerations shall be:

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3. The Honorable Miles W. Lord, United States District Judge for the District of Minnesota.

> [t]he promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, *or unfair or destructive competitive practices*[.]

Id. (emphasis added).

49 U.S.C. § 1381 states that the CAB "may, upon its own initiative or upon complaint by any air carrier * * * or ticket agent" investigate and make determinations in regard to any alleged "unfair or deceptive practices or unfair methods of competition." This same section gives the CAB authority to issue cease and desist orders in connection with such practices or methods of competition. 49 U.S.C. § 1482 (amended 1977 and 1978) and 14 C.F.R. § 302[4] are the statutory provisions and regulatory rules for the relevant administrative proceedings.

14 C.F.R. § 399.80 enumerates those practices which the CAB regards as unfair or deceptive or as an unfair method of competition. For example, 14 C.F.R. § 399.80(n) designates as one of these practices: "[m]isrepresentation as to the requirements that must be met by persons or organizations in order to qualify for charter or group fare flights." It is one of ITA's arguments that through false and deceptive advertising, Western misrepresented ITA's TGC requirements and operations.

49 U.S.C. § 1384 (amended 1978) is a specific immunity clause of the federal aviation program, which provides in regard to the antitrust laws, that "[a]ny person affected by any order made under [49 U.S.C.] sections 1378, 1379, or 1382 * * * shall be, and is hereby, relieved from the operations of the 'antitrust laws.'" As is apparent by the description of the statutory and regulatory authority upon which Western relies, Western does not allege that this

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4. 14 C.F.R. § 302 has been amended in several sections since the occurrence of the activities involved in this lawsuit. For purposes of our discussion, however, citations to the current regulations will suffice inasmuch as the fact that the administrative procedures were somewhat different during the time frame of the activities of Western is immaterial to the question of primary jurisdiction.

immunity grant covers the instant case. Thus our discussion need not deal with exclusive jurisdiction with the CAB, but rather only that of primary jurisdiction.

Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973) provides us with the primary considerations relevant to the doctrine of primary jurisdiction. The regulatory agency involved in *Ricci* was the Commodity Exchange Commission. The plaintiff alleged that he was excluded from trading on the Chicago Mercantile Exchange pursuant to an unlawful conspiracy in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. While acknowledging that the Commission could not immunize conduct from the antitrust laws, the Supreme Court determined that the Commission had primary jurisdiction because (1) a factual determination of whether or not the action taken by the Commission was pursuant to a valid rule would clarify what question was necessary for the Court to decide — *i. e.,* (a) if the action was pursuant to a valid rule, the question would be whether the rule is insulated from the antitrust laws, *see Board of Trade v. United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683 (1918) (reasonable restraint of trade); (b) if the action in question was contrary to the rules, the antitrust action would presumably "take its normal course," *Ricci v. Chicago Mercantile Exchange, supra,* 409 U.S. at 304, 93 S.Ct. at 581; (2) that there was statutory authority for the Commission to settle the dispute; and (3) the adjudication of the dispute by the Commission would materially aid the Court "in arriving at the essential accommodation between the antitrust and the regulatory regimes." *Id.* at 307, 93 S.Ct. at 583.

The purpose of these considerations is to provide focus upon the controlling principle involved in the conflict of regulatory and judicial activity, which is that the courts "must refrain from imposing antitrust sanctions for activities of debatable legality * * * in order to avoid the possibility of conflict between the courts and [agencies]." *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 220, 86 S.Ct. 781, 786, 15 L.Ed. 709 (1966).

While the CAB has statutory and regulatory authority to determine unfair competition (the second consideration listed), it is difficult to see how a determination by the CAB, as to whether Western's activities constituted, *e. g.*, unfair competition, would clarify any questions presented to this court — the question would still be whether those activities constituted an antitrust violation. For as we have pointed out, there is no basis for antitrust immunity under action taken pursuant to 49 U.S.C. §§ 1302, 1381 or 1482.

This differs from the factual situation in *Ricci v. Chicago Mercantile Exchange, supra,* inasmuch as in *Ricci,* as is apparent by the Court's observation, the Commodity Exchange Act "contemplates that the Exchange and its members will 'engage in restraints of trade which might well be unreasonable absent *sanction*' by the Act." *Id.,* 409 U.S. at 304, 93 S.Ct. at 581, *quoting Silver v. New York Exchange,* 373 U.S. 341, 360, 83 S.Ct. 1246, 1258, 10 L.Ed.2d 389 (1963) (emphasis added). If the action in *Ricci* was determined by the Commission to be within the Exchange rules, there would be an affirmative sanction by the Exchange of the activities in question. In the instant case, even if the CAB would determine that there was no violation by Western of the CAB prohibitions against unfair competition, this would not be an affirmative sanction of the activities by the CAB. Thus a finding of an antitrust violation by this court would not create a substantial conflict. *Carnation Co. v. Pacific Westbound Conference, supra.*

A determination by the CAB, as to whether or not the activities constituted unfair competition, would not necessarily aid the court in arriving at an accommodation between the CAB regulations and the antitrust laws, for there would not necessarily exist a conflict even if the CAB decides one way and this court holds the opposite.

We hold that this court properly has jurisdiction of this case.

II. Factual Findings by the District Court

A. *General Overview*

As defined by the Special Master in his findings of fact, a travel group charter

is a form of charter air travel in which the individual traveler is a party to the charter contract incurring liability for the prorata share of the charter cost and running the risk that his cost may increase, depending upon the load factor ultimately achieved. TGCs are organized by independent charter organizers. * * In enacting the TGC concept, the CAB's purpose was to provide charter competition to the regularly-scheduled airlines, and low air fares to the public at large.

ITA began operations of TGCs in the summer of 1973 with the Minnesota State Automobile Association (MSAA) acting as a wholesaler and retailer for the TGCs organized and arranged by ITA.[5] The TGCs first operated were flights from Minneapolis-St. Paul to London.

Initially planned for 1974 by ITA were eight Hawaii flights, four Mexico flights and thirteen London flights. Preparation and advertising for some of these began at least as early as 1973. Later it was decided to only schedule four Hawaii flights.

During the summer of 1973, two travel agencies began advertising Hawaii TGCs for departure during January-March 1974. Those travel agencies were Mainline Travel and Travel World.[6] These two travel agencies, along with MSAA, comprised a major portion of the Minnesota travel market; Mainline and MSAA were the two largest travel agencies in Minnesota.

Also during the early part of 1973, TGCs were advertised in west coast newspapers for TGCs from west coast cities to Hawaii. Western Airlines, concerned by the competitive threat of these west coast TGCs, sought the assistance of BBD&O, its advertising agency, in formulating and adver-

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5. ITA was formed in June 1972 and initially packaged affinity group charters. As defined by the Special Master, "[a]ffinity charters involve groups having some community interest apart from transportation, for example, membership in a club, who engage an aircraft for transportation to be paid for on a pro-rata basis." After the CAB adopted, in September 1972, regulations concerning TGCs, ITA entered this market.

6. Travel World is also referred to as Travel Center in the record.

tising response. As a result, and with aggressive assistance[7] from BBD&O, Western caused an ad to appear in several major west coast papers which had the effect of reducing competition from west coast TGCs. This was one of Western's first acts in what has been referred to as an anti-TGC campaign. This finding by the Special Master, of effectiveness of the ad, is supported by the testimony of Burt D. Lynn, Vice-President of Advertising and Sales Promotion of Western Airlines, who testified that the feedback from the travel agents on the west coast was that the ad was effective.[8]

On August 30, 1973, ITA and MSAA (who was to act as wholesaler and handle reservations and bookings for the TGCs) held a kick-off party for the Hawaii and Mexico TGCs. ITA distributed information about the TGCs to the travel agents in attendance. The first ITA/MSAA Minnesota ads for the Mexico and Hawaii TGCs appeared on September 2, 1973.

Western caused to be published on Sunday, September 16, 1973, an ad in the Minneapolis paper, which, but for a few changes, was identical to the ad Western caused to be published in the west coast papers early in 1973. There was also radio advertising (prepared by BBD&O) aired on a St. Paul-Minneapolis station between September 13 and September 16, 1973, which advised listeners to "[b]e sure to see the Western Airlines ad in the travel section of your

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7. Burt D. Lynn, Vice-President of Advertising and Sales Promotion for Western Airlines, testified that he contacted BBD&O to begin work on an advertising response to the west coast TGCs, and that he was informed by John Doyle, of BBD&O, that BBD&O was already working on an advertising response.

   Lynn additionally testified that Jack Bernardy, BBD&O Accounts Supervisor for Western Airlines, gave Lynn an initial draft of the advertisement, that Lynn made a few changes, but that the ad as published was substantially the same as the initial draft.

8. Additionally, Western chose not to rerun the ad inasmuch as TGCs had ceased doing well on the west coast and chose to run a very similar ad in the Minnesota papers. Both of these factors may have been taken into consideration in regard to the findings by the Special Master that the ad was effective.

Sunday newspaper" and "[l]ook for the full-page Western Airlines ad in the travel section of your Sunday newspaper."

Finally, there was a letter on Western Airlines' stationery addressed to "Dear Partner in Travel," and dated September 13, 1973, signed by Lynn Zumbrunnen, Regional Director, Marketing/Sales for Western Airlines. The letter was drafted by BBD&O and sent to Minnesota travel agents along with a proof copy of the September 16 ad.[9]

Additional acts by Western with respect to ITA's TGCs include a letter from Western addressed to Mainline Travel which discouraged the participation of Mainline with TGCs. The April 25, 1973 letter read as follows:

Dear Warren [President-Mainline Travel]:

By now you may feel that I have an obsession against Travel Group Charters, and that may be so, but I am more concerned with keeping one of our top producing agents in a strong, healthy position.

I certainly don't believe that involving yourself in TGCs into the Pacific is the answer. At least not at this point and time. I think the case in point is capsulized very

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9. In relevant part, the letter read as follows:

There has been a good deal of talk and activity centered around Travel Group Charters. Obviously, Western has a point of view on TGCs. Frankly, we don't think they are a good deal for the public or for the travel industry. Let me tell you why.

* * * * * * *

Most TGCs are filed for peak-season departures. We wonder if the entire travel industry isn't doing itself a good deal of harm to take its prime vacation destinations and sell them at bargain basement rates during a period when that product is at peak demand.

* * * * * * *

I have attached a proof of the first advertisement that is scheduled to run in newspapers in your area on Sunday, September 16. I believe you will find it a very effective tool in explaining to your clients the problems inherent in TGCs. When they decide to book their Hawaiian vacation on a scheduled carrier, we hope you will make sure it is on Western Airlines, "The Only Way To Fly".

well in the attached article that appeared in the April 18th issue of the Honolulu Advertiser. I believe you will find it interesting reading.

Sincerely,
/s/ Bill
[W. E. Balfour, Vice President
Marketing/Passenger Sales,
Western Airlines]

One other specific piece of evidence (we have not attempted to be all-inclusive in our restatement of the facts) is a recommendation from Zumbrunnen (Western) to Balfour (Western) which suggested, *inter alia,* a rerun of the west coast ad in the Minnesota papers. The recommendation read, in relevant part:

As we have discussed with you quite frequently during the last few days regarding the pending TGC and ITC programs scheduled to depart the Twin Cities during the first quarter, the following recommendations and observations are for your consideration:

Today we held a staff meeting and quite extensively kicked around the programs as to their validity from a competitive evaluation. It was agreed by all that the existing programs create a very serious competitive situation. Our feedback from the travel agents indicate that they will support these programs — ITC programs to a greater extent than TGC programs. This observation I heartily agree with and share in our staff's observations.

* * * * * *

It was nearly unanimous that a positive reaction to this competitive situation be made by Western Airlines prior to the middle of September. This successful reaction would be a rerun of our TGC advertisement which appeared in the Los Angeles area tailored to this situation. In addition to the ad, a direct mail program regarding the same would be sent to all travel agencies. If it is possible to delay any fare increases until Spring, the ad campaign might not be necessary with the exception of

a direct mailer to the travel agents. This, of course, is very serious business; and consequently, we would like such a mailer to be reviewed by general office staff.

B. *The Ad*

Western first contends that the Special Master erred in finding the September 16 newspaper ad to be false, misleading and deceptive.[10] The Special Master found as follows:

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10. Western asserts, as a defense to ITA's allegations, that ITA's TGC advertisements — appearing before Western initiated its anti-TGC campaign — were deceptive, illegal and fraudulent, and thus Western should not be held liable for its own challenged conduct. We find the Special Master's reliance on *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138-40, 88 S.Ct. 1981, 1984-85, 20 L.Ed.2d 982 (1968) to be on point and controlling:

> Although *in pari delicto* literally means "of equal fault," the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing. We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes. It was for this reason that we held in *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), that a plaintiff in an antitrust suit could not be barred from recovery by proof that he had engaged in an unrelated conspiracy to commit some other antitrust violation. Similarly, in *Simpson v. Union Oil Co.*, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964), we held that a dealer whose consignment agreement was canceled for failure to adhere to a fixed resale price could bring suit under the antitrust laws even though by signing the agreement he had to that extent become a participant in the illegal, competition-destroying scheme. Both *Simpson* and *Kiefer-Stewart* were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an everpresent threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage con-

20. On September 16, 1973, in response to the substantial competitive threat, Western caused the publication of an ad similar to its west coast ad in the Twin Cities and other larger cities in Minnesota (Ex. 21). The ad appeared in the Travel Sections of the Minneapolis and St. Paul Sunday papers (as well as those of Rochester, Duluth, and other Minnesota cities). As with the west coast ads, it was substantially the work product of BBD&O.

21. It was false, misleading, or deceptive in the following ways:

a. The statement:

"No travel group charter has ever taken off to Hawaii from the Twin Cities. All those scheduled had to be cancelled."

was false and misleading in that if this language is interpreted as stating that all Twin Cities/Hawaii TGCs ever scheduled had been cancelled, it was false since Mainline Travel and MSAA/ITA were advertising Twin Cities/Hawaii TGCs simultaneously with Western's ad and the TGCs had not been cancelled. If the language is interpreted as meaning that all Twin Cities/Hawaii TGCs scheduled to depart prior to September 16th had been cancelled, it was equally misleading since none had ever been so scheduled.

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tinued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct. *Kiefer-Stewart, supra.*

In light of these considerations, we cannot accept the Court of Apppeals' idea that courts have power to undermine the antitrust acts by denying recovery to injured parties merely because they have participated to the extent of utilizing illegal arrangements formulated and carried out by others. * * * We therefore hold that the doctrine of *in pari delicto,* with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.

The only exception that *Perma Life* allows is when the illegal conspiracy "would not have been formed but for the plaintiff's participation." *Javelin Corp. v. Uniroyal, Inc.,* 546 F.2d 276, 279 (9th Cir. 1976), *cert. denied,* 431 U.S. 938, 97 S.Ct. 2651, 53 L.Ed.2d 256 (1971). This exception is not applicable here.

b. The statement:

> "The upshot of it all being that you can plunk down a couple of hundred dollars (or more) for airfare and even more for ground arrangements. And end up going absolutely nowhere."

was misleading in that under the TGC regulations, it was impossible for a prospective passenger to ever forfeit money paid to the organizer for ground arrangements.

c. The statement: "Find out your hotel (if you buy an optional ground package). Nobody's sure yet either." was false and misleading in that the statement was not true as of the date of the ad for ITA's TGCs. Mr. Russell and Mr. Edberg of MSAA testified that on September 16, a passenger's hotel was known at the time of reservation.

d. The ad was false and misleading in stating that the TGC organizer could charge a five percent transfer fee. By contract ITA could not do so.

e. The ad was false and misleading in stating that the TGC passenger was "virtually out of luck" within 45 days before departure. The standby list could be utilized within 45 days of departure and in fact was so used on ITA's 1973 TGCs to London. For this same reason, the statement "If your boss switches your vacation, for example, you've had it," was misleading.

f. The statement that the travel agent "understands all the pros and cons of Travel Group Charters" was misleading since at the time of the ad travel agents did not know much about the TGC concept. Also, Western was, at the same time, discouraging travel agents from selling TGCs.

g. The statement:

> "Nationally, over 2,600 travel group charters have already been cancelled. That's 9 out of 10 flights that were scheduled."

was misleading since this national experience was not representative of the Twin Cities' experience with TGCs. In particular, all of the TGCs scheduled out of Minnea-

polis/St. Paul to London in 1973 and operated by ITA/MSAA operated sucessfully. It was also misleading because it referred to flights listed in prospectuses filed with the CAB and was not limited to cancellations occurring because of inability to attract sufficient passengers to allow operations under the Rules, the only circumstance which would be relevant to the alleged informational purpose of the ad.

Western argues, *inter alia,* that (1) the seven specific statements were not found to be *materially* false or misleading; (2) the ad was not considered in the context in which it appeared (a "lengthy travel section of a bulky Sunday newspaper along with a large number of other travel ads," quoting from Western's brief); and (3) that in any event, the statements in the ad are not false, misleading or deceptive.

We think that implicit in the causation of damage finding, discussed *infra,* materiality is shown. Secondly, the ad was submitted in at least one exhibit in the context of the newspaper travel section and the Special Master had the opportunity to consider the ad in that context.

As to the content of the ad itself, we find it unfruitful, and additionally unnecessary, to examine individually the seven allegedly false, deceptive or misleading statements. The issue is first, whether the ad as a whole, contributed to the "anti-TGC campaign," and second, whether the campaign constituted an unreasonable restraint of trade under section 1 of the Sherman Act.

It will be relevant, however, in the analysis leading to a determination of reasonableness of the anti-TGC campaign, to consider the personality of the ad as a whole. For an example of one of the stronger of the Special Master's seven findings insofar as ITA is concerned, Western admits that the statement in Finding 21(a), "[a]ll those scheduled had to be cancelled," was incorrect; on September 16, when the ad appeared, ITA and MSAA, Mainline and Travel World were actively promoting their Hawaii TGCs—obviously they were not cancelled. The weakest finding of fact insofar as ITA is concerned is Finding 21(f)—"[t]he statement that the travel agent 'understands all the pros

and cons of Travel Group Charters' was misleading." What is most important here is not that the travel agents did not know all the pros and cons of TGCs, but that, as part of its overall anti-TGC campaign, Western was (1) discouraging travel agents from selling TGCs to their customers and, additionally; (2) stating that Western hoped the travel agents would book their customers on Western, and finally; (3) telling potential customers, through the September 16 ad, to see their travel agent for supposedly an objective appraisal of TGCs.

Thus keeping in mind that the ultimate question is whether the anti-TGC campaign was an unreasonable restraint of trade under section 1 of the Sherman Act, we hold that there is sufficient evidence to support the Special Master's finding of facts that the ad is false, deceptive and misleading. We further agree that the ad was part of the anti-TGC campaign and must be considered in determining whether or not an unreasonable restraint of trade occurred.

C. *Travel Agent Letter*

The second major act in the anti-TGC campaign was mailing a copy of the ad, along with the letter drafted by BBD&O, to travel agents in Minnesota.[11] The contents of the ad have already been discussed. The letter, the Special Master found, was designed to discourage the travel agents from participating in TGCs and from selling TGCs to the public. The letter speaks for itself, Part II A *supra,* and we agree that it was part of the anti-TGC campaign and must be considered when determining the reasonableness of the campaign under Sherman § 1.

D. *Radio Commercial*

The final major segment of the alleged anti-TGC campaign is the radio advertising. The radio commercial refers to the September 16 ad; the contents of the ad have been discussed. Other than that, it is only necessary at this point to note that the radio advertising was also part of the anti-TGC campaign and must be considered when determining the reasonableness of the campaign.

11. *See* note 9 *supra.*

E. *Other Activities*

Although they were not specifically directed at the Minnesota TGCs, also relevant to the factual background of our analysis are Western and BBD&O's activities on the west coast in regard to TGCs. Western contacted BBD&O in reference to a west coast advertisement to meet the competitive threat of TGCs against Western; the ad was run in February 1973 in several major west coast papers; and the ad was found to have effectively reduced competition from TGCs on the west coast. All of the foregoing can be used as a base for reference in connection with Western's knowledge of the impact of the ad and Western's reason for using the ad in Minnesota.

Additionally, credibility for ITA's charge of an anti-TGC campaign can be gleaned from (1) the April 25, 1973 letter from Western to Mainline, pp. 11-12 *supra,* discouraging the use of TGCs; (2) Zumbrunnen's recommendation to Balfour that the west coast ad should be used in Minnesota, pp. 12-13 *supra*; (3) the knowledge that TGCs were actively opposed by Western on the west coast; (4) the fact that by April 1973, Western's Minneapolis personnel had been instructed by Balfour to monitor, as closely as possible, TGC activity in Minneapolis-St. Paul; and (5) the fact that in August 1973, Balfour told the Travel Agent's Advisory Council that Western was opposed to TGCs on the west coast.

Thus, we specifically hold that there is sufficient evidence to support the Special Master's conclusion that these activities were part of an anti-TGC campaign.

III. Contract, Combination or Conspiracy

Having determined the nature of the above activities and having determined that they constituted an anti-TGC campaign, we must now determine whether these activities were an unreasonable restraint of trade under section 1 of the Sherman Act.

To find a violation of section 1, there must first be a finding of a contract, combination or conspiracy. Western argues that the district court erred in finding that BBD&O's

contribution to the activities was sufficient to establish that a contract, combination or conspiracy existed between Western and BBD&O. Primarily, Western contends that BBD&O acted only as an agent providing technical services to Western, and that this is not the type of combination that the Sherman Act covers.

The Special Master found as follows:

9. Batten, Barton, Dirsten and Osborne (BBD&O)[12] was at all relevant times engaged in the advertising business. BBD&O and Western were at all relevant times separate and independent legal entities. Between 1970 and 1974, Western was the largest of six accounts at the Los Angeles office of BBD&O.

10. In January of 1973, Bert Lynn, Western's vice president for advertising and promotion, made the decision to seek the help of BBD&O in formulating a response to meet the competitive threat of TGCs operating between west coast cities and Hawaii. Lynn and Willis Balfour, Western's vice president for passenger sales, had agreed that an advertisement would be the best way to meet this competitive threat.

11. Upon contacting BBD&O's John Doyle, Lynn was told that BBD&O had already commenced work on an advertisement discouraging use of TGCs. The person at BBD&O in charge of the Western account was Jack Bernardy.

12. Although Lynn gave Bernardy general guidelines concerning the ad and reviewed BBD&O's ad copy, the ad as published was the result of BBD&O's active participation and was substantially the work product of BBD&O.

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22. Although the Twin Cities ad was initially scheduled to run at least twice, BBD&O issued the order to cancel it after its first run because of "copy problems."

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12. *See* note 2 *supra*.

23. BBD&O also prepared radio advertising discouraging use of TGCs for broadcast on WCCO, the Twin Cities station with the highest listening ratings. It utilized live announcements by some of the station's most popular announcers (Ex. 106).

24. BBD&O actively and knowingly participated in the Western anti-TGC campaign in Minneapolis and St. Paul in September 1973.

25. BBD&O was at all times aware that the purpose of the campaign was to prevent the TGC from becoming a competitive threat to Western's regularly scheduled air service.

26. BBD&O actively, knowingly, and voluntarily engaged in a course of conduct with Western designed to prevent TGCs from becoming a competitive threat to Western.

Western does not attempt to distinguish the instant case from *Albrecht v. Herald Co.,* 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968). In *Albrecht,* the defendant had hired Milne Circulations Sales, Inc. to call or personally solicit newspaper customers to switch to direct delivery of the newspaper instead of continuing delivery by the plaintiff. The Supreme Court ruled that there was a combination within section 1 between the newspaper, Milne and Kroner, the person hired to take over the route in the meantime. The Court noted that the efforts of Milne and Kroner had some effect on the customers, and while undoubtedly Milne was acting to earn a fee, it was aware of the aim of the newspaper. The aim or goal of the paper was to get the plaintiff to lower his prices.

We perceive no material distinction between the instant case and *Albrecht.* The Special Master found, and there is sufficient evidence to support the fact, that BBD&O was aware that the purpose of the anti-TGC campaign was to prevent TGCs from becoming a competitive threat to Western's regularly scheduled (monopoly) air service to Hawaii.

Thus, the fact that BBD&O participated in the anti-TGC campaign and that BBD&O "materially aided the accom-

plishment of Western's plan"[13] with the knowledge of the purpose of such campaign is sufficient to satisfy the *Albrecht* requirements. *Tamaron Distributing Corp. v. Weiner*, 418 F.2d 137, 139 (7th Cir. 1969), *quoting Albrecht v. Herald Co., supra*, 390 U.S. at 150, 88 S.Ct. at 871. *But see Tamaron Distributing Corp. v. Weiner, supra*, 418 F.2d at 140 (Knoch, J., concurring). *See generally Quality Mercury, Inc. v. Ford Motor Co.*, 542 F.2d 466 (8th Cir. 1976), *cert. denied*, 433 U.S. 914, 97 S.Ct. 2986, 53 L.Ed.2d 1100 (1977).

IV. Unreasonable Restraint of Trade — Sherman § 1

Having decided (1) that there were activities in which BBD&O and Western engaged that constituted an anti-TGC campaign and (2) that BBD&O's participation was sufficient to satisfy the contract, conspiracy or combination requirement of section 1, we now must reach the ultimate question of law — whether or not the anti-TGC campaign constituted an unreasonable restraint of trade under section 1 of the Sherman Act.

The relevant factual findings and conclusions of law, as stated by the Special Master, are as follows:

FINDINGS OF FACT

* * * * * *

58. Western's purpose in embarking on its anti-TGC campaign in the Twin Cities and other Minnesota cities was to prevent the TGCs from becoming a competitive threat in this area.

59. Its purpose was not to merely inform the public or to speak out on a political issue. If such had been the case, a substantially misleading or deceptive campaign would have been unnecessary.

* * * * * *

61. Western was aware that the natural and probable consequences of its veiled threats to MSAA to reduce

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13. *See* note 7 *supra*.

preferred allocation of Group 60 space was to induce MSAA to cancel the TGC plans it had with ITA.

62. Western's anti-TGC campaign was knowingly, intentionally, and purposefully designed to eliminate TGCs as a competitive force to Western's regularly scheduled air service, and Western was aware that such elimination of competition would be the natural and probable consequence of its conduct.

CONCLUSIONS OF LAW

* * * * * *

6. BBD&O did in fact combine and conspire with Western in restraint of trade by knowingly and actively participating in a course of anti-competitive conduct.

7. Western's publication of the ad of September 16, 1973, was part of a course of conduct constituting an unreasonable restraint of trade. The ad was false, misleading, and deceptive. Publication of the ad was not protected by the First Amendment of the United States Constitution.

8. Western's distribution of the "Dear Partner in Travel" letter to travel agents in Minnesota was part of a course of conduct constituting an unreasonable restraint of trade.

* * * * * *

10. Western's course of conduct was deliberately and purposely designed to prevent the TGC, a lawfully enacted concept, from effectively competing with regularly scheduled air service, in direct contravention of an express policy of the United States government.

11. Western's course of conduct was in violation of Section 1 of the Sherman Act and caused damage to ITA.

12. * * * Western possessed monopoly power in [the Twin Cities/Hawaii travel] submarket.

* * * * * *

18. Western entered into the combination with BBD&O with the specific intent to monopolize that portion of interstate commerce consisting of individually ticketed air transportation on the Twin Cities/Hawaii route.

What is preliminarily a matter for discussion is the questions which are not presented to us. We are not called upon to determine if the newspaper ad, the radio commercial or the travel agent letter are unreasonable re-restraints of trade in and of themselves.[14] To examine the purpose or effect of each of these individually would not be fruitful, nor would it be a controlling analysis. Each of these occurrences is merely an act contributing to the anti-TGC campaign.

Deciding as a matter of law whether or not the anti-TGC campaign was an unreasonable restraint of trade is a difficult question. It is not a conventional "restraint of

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14. Western devotes much time and effort to a First Amendment defense, arguing in connection with this defense that the Sherman Act cannot be violated by the publication of an ad. We find no merit in this argument. First, the First Amendment/Sherman Act relationship is embodied in the *Noerr-Pennington* doctrine, *United Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965) and *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and the basis of this doctrine is not an all-encompassing First Amendment protection. While consideration of the First Amendment is an inherent part of the *Noerr-Pennington* analysis, the basis is that activities done in furtherance of the right to petition are not within the scope of the Sherman Act. *State of Missouri v. National Organization for Women, Inc.,* 620 F.2d 1301 (8th Cir. 1980).

Secondly, the ad is not the violation in this case; the violation is the anti-TGC campaign.

Finally, Western admits that conduct otherwise illegal cannot be immunized merely because it was carried out by means of speech. Consequently, simply because part of the anti-TGC campaign (which we hold to be an unreasonable restraint of trade) was carried out by means of "speech," does not create a basis for immunization.

trade," *i.e.*, a tie-in, price fixing or territorial division.[15] It is, in fact, a form of competition and because competition is the object sought to be preserved by the antitrust laws, we must be careful in drawing a line between fair competition, unfair competition and competition that is so unfair as to rise to the level of an unreasonable restraint of trade. *See Northwest Power Products, Inc. v. Omark Industries, Inc.*, 576 F.2d 83, 88-90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116, 99 S.Ct. 1021, 59 L.Ed.2d 75 (1979).

The traditional analysis for examining a restraint of trade under the rule of reason was struck in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683 (1918). The courts must examine the purpose, the market power and the anticompetitive effect of the restraint, and thus arrive at a conclusion as to the reasonableness of the restraint.

The market power is relevant as part of the overall analysis inasmuch as it has been accepted in antitrust law that "Davids can engage in many kinds of conduct in the marketplace that are forbidden to Goliaths." *Purex Corp. v. Proctor & Gamble Co.*, 596 F.2d 881, 885 (9th Cir. 1979). In the instant case, Western does not dispute that it had monopoly power over the Twin Cities-Hawaii travel route. Thus, Western's market power was great, and the limitations upon Western's activities in regard to "competition" increased somewhat commensurately with its power.[16] (While Western's monopoly power was over the Hawaii travel route, the anti-TGC campaign was not limited to Hawaii TGCs.) *See* pp. 1272-1273 *infra*.

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15. *But see Perryton Wholesale, Inc. v. Pioneer Distributing Co.*, 353 F.2d 618, 621-22 (10th Cir. 1965), *cert. denied*, 383 U.S. 945, 89 S.Ct. 1202, 16 L.Ed.2d 208 (1966) (conspiracy to suppress competition through the elimination of competition by unfair means is an unreasonable restraint of trade).

16. As discussed in Part V *infra*, Western also had a monopoly over the Twin Cities-Las Vegas route, and operated a plan known as the Group 60 Fare, the seats for which were very much in demand by travel agencies.

The crux of the reasonableness of the restraint in this case is the purpose of the anti-TGC campaign. For the antitrust laws would not be served at all were we to prohibit even a monopolist from competition.[17] *See Union Leader Corp. v. Newspapers of New England Inc.*, 284 F.2d 582, 584 (1st Cir. 1960), *cert. denied*, 365 U.S. 833, 81 S.Ct. 747, 5 L.Ed.2d 744 (1961). On the other hand, improper competition, at some point and under some circumstances, can be a violation of Sherman section 1. *Atlantic Heel Co. v. Allied Heel Co.*, 284 F.2d 879 (1st Cir. 1960). We hold that the anti-TGC campaign was an unreasonable restraint of trade.

Important to our ruling is that the purpose and direction of the anti-TGC campaign was not to compete with ITA's TGCs, but rather was to prevent TGCs from becoming a competitive threat to Western's regularly scheduled air service. Further, the means by which Western sought to achieve this end was not fair competition, but rather an organized full frontal attack which (1) used false, misleading and deceptive advertising and (2) was directed at (a) consumers and (b) travel agents. While it might have been reasonable for a monopolist such as Western to conduct an aggressive anti-TGC campaign against ITA's TGCs, *see William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 461 F.Supp. 410, 425 (N.D.Cal.1978), it was not reasonable for a monopolist such as Western to use the means described above with the purpose of preventing any effective competition from ITA's TGCs. See, *i. e., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.* 508 F.2d 547, 562 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004, 95 S.Ct.

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17. Hard competition * * * is neither unfair nor a violation of the antitrust laws * * * the antitrust laws were not designed to immunize competitors from the public-serving rigors of the market place; rather they were supposed to advance the system of free competition to the fullest extent practicable, all to the end that the consuming public might receive better goods and services at lower prices.

General Communications Engineering, Inc. v. Motorola Communications & Electronics, Inc., 421 F.Supp. 274, 290-91 (N.D.Cal. 1976).

2407, 44 L.Ed.2d 673 (1975) wherein the court notes that distinctions exist (although in this case in regard to a per se analysis) between "crippling the organization of a competitor" and "beating it in the market place," or between "going to the jugular and going to one of the lesser arteries." This is the difference we perceive in this case. Western did not choose to compete with ITA's TGCs, but rather chose to prevent TGCs from becoming competition in the market place. Under the rule of reason, Western's anti-TGC campaign is an unreasonable restraint of trade.

The tremendous effect of Western's compaign makes clear the unreasonableness of the restraint of trade inherent in the pervasive anti-TGC campaign. This is discussed in Part VII A *infra*.

V. Sherman § 2 Findings of Fact.

During the relevant time period, Western operated a promotional device known as the Group 60 Fare on its Twin Cities/Las Vegas route in order to compete with affinity charters, defined note 5 *supra*. Western had a monopoly in this travel market as it was the only regularly scheduled air carrier having direct and non-stop flight service between the Twin Cities and Las Vegas.

Promotional group fares such as the Group 60 Fare, as described by the Special Master, are designed to stimulate traffic and provide full-plane economies characteristic of charters. Western would allocate to one travel agent (serving as a wholesaler and retailer) usually 80 — occasionally 124 — seats on a round trip basis under the Group 60 Fare. As of September 1973, Western consistently allocated to MSAA and Mainline Travel the most preferred space to Las Vegas.

Because these Group 60 Fare seats were in demand by travel agents, Western received complaints that the most preferred space was allocated to MSAA and Mainline. This supply-demand inbalance gave Western market power leverage to impose its wishes on the travel agents.

On September 25, 1973, Western and MSAA officials held a meeting, at MSAA's request, in connection with which the Special Master made the following findings of fact:

49. Western and MSAA officials met in MSAA's Bloomington headquarters on September 25, 1973. Western officials at the meeting were Lynn Zumbrunnen and Jon Meyers; MSAA officials present were Robert Rossman, Arthur Tomlinson, and Duane Edberg.

50. MSAA officials tried to point out the more blatant misstatements in the ad. Zumbrunnen, however, refused to discuss them. Zumbrunnen stated he was instructed by Balfour, his superior, not to discuss the ad with MSAA officials.

51. Zumbrunnen's statements and conduct forced MSAA to recognize its dependence upon Western's continued preferential treatment of MSAA on Group 60 tariffs to Las Vegas, Western being the only direct, nonstop carrier to Las Vegas. MSAA became aware that its continued promotion of TGCs would jeopardize its ability to market the Group 60 tariff with Western.

52. By reason of the statements and conduct of Western officers, MSAA officials felt it best to cooperate with Western and not to proceed with MSAA's planned TGC operations with ITA.

53. Shortly after the meeting, and as a direct result of it, MSAA announced that it was cancelling the Hawaii and Mexico TGCs planned with ITA.

54. MSAA based its decision on the decrease in public interest caused by Western's anti-TGC campaign and on the potential reduction of MSAA's preferred Group 60 space.

55. Shortly after MSAA cancelled its Hawaii and Mexico TGCs with ITA, MSAA cancelled its London TGCs planned with ITA for the same reasons.

As is clear from the Special Master's wording in Findings of Fact number 51 and number 52, the Special Master *did not specifically find* that Western told MSAA that unless

MSAA cancelled its TGCs planned with ITA, that Western would not allocate any Group 60 Fare seats to MSAA. However, in the Special Master's Memorandum of Law, he states "veiled threats were issued to the effect that MSAA's preferential treatment on Western's Group 60 flights would be jeopardized if it continued to participate with ITA in the operation of TGCs," and "[t]he combination of this threat and the fear of decreased public interest in TGCs caused by Western's ad prompted MSAA to cease its participation in the joint ITA/MSAA TGC program."

And in his Findings of Fact the Special Master *did find* that Western, through Zumbrunnen's statements and conduct at the meeting, caused MSAA to cooperate with Western and to cancel the Hawaii, Mexico and London TGCs. An additional cause of the cancellation of the TGCs was Western's effective anti-TGC campaign.

We are satisfied that there is sufficient evidence to support the Special Master's findings. The evidence includes the fact that the power of leverage by Western was established; that there was evidence presented from which the Special Master may have concluded that such leverage had been used in the past; that it was established that MSAA had an "awareness" of the leverage and power that Western possessed; that Zumbrunnen's testimony revealed that the subjects of the Group 60 Fare seats and Western's Hawaii market were both discussed at the meeting; that on October 5, 1973, the Hawaii TGCs were cancelled by MSAA, the Mexico TGCs were rescheduled and then later cancelled; and that the London TGCs were cancelled on October 25, 1973.[18]

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18. Western points out that the meeting was called by MSAA to discuss the ad, and that the ad was cancelled following the meeting. Western argues from this that it is inconsistent to conclude that MSAA was threatened by Western in regard to MSAA's participation in TGCs. Apparently, it is Western's contention that if MSAA succeeded in having Western cancel the ad, then MSAA had the upper hand throughout the entire meeting. We perceive no inconsistency in both of these topics, cancelling the ad and cancelling the TGCs, being discussed, and the finding of a threat by Western.

It is not our function to try this case *de nova,* to pass upon credibility of witnesses or to determine the weight to be given to any particular testimony. *Stanley v. Henderson,* 597 F.2d 651, 653 (8th Cir. 1979). We can only declare a finding of fact clearly erroneous if there is not substantial evidence to support it, if it evolves from an erroneous conception of the applicable law, or if, upon considering the entire record, we are left with a definite and firm conviction that a mistake has been made. *Bowers v. Kraft Foods Corp.,* 606 F.2d 816, 818 (8th Cir. 1979); *Southern Illinois Stone Co. v. Universal Engineering Corp.,* 592 F.2d 446, 451 (8th Cir. 1979).

We affirm the Special Master's Findings of Fact in connection with the appearance, content and result of the September 25 meeting.

VI. Monopolization — Sherman § 2

To show, as a matter of law, monopolization under section 2, Western must be shown to possess monopoly power, willful acquisition or maintenance of that power, *Purex Corp. v. Procter & Gamble Co., supra,* 596 F.2d at 890, and of course, causal antitrust injury. *Admiral Theatre Corp. v. Douglas Theatre Co.,* 585 F.2d 877, 892 (8th Cir. 1978).

The Special Master found there to be monopoly power by Western over the Hawaii and Las Vegas flights from the Twin Cities and Western does not contest these findings.

As to the second element, willful maintenance of the monopoly power in this case, all activities discussed in connection with the section 1 claim (unreasonable restraint of trade) are relevant to the section 2 claim in that they contributed to the willful maintenance of Western's monopoly power over the Hawaii route by preventing TGCs, and consequently the Hawaii TGCs, from becoming a competitive threat to Western's Hawaii monopoly route.

As to the September 25 meeting, Western's use of the Las Vegas air route power it possessed to eliminate the competition of ITA's TGCs to Hawaii is clearly as a matter of law, willful maintenance of the Hawaii air route mo-

nopoly. Thus, the Special Master was correct in finding a section 2 violation.

The effects of the section 2 violation are addressed with the effects of the section 1 violation in Part VII, *infra*.

VII. Causation of Fact of Injury and Damages

In a private antitrust suit, the plaintiffs must show the violation and additionally must show "to a reasonable certainty that there has been injury to them by reason of" the violation. *Admiral Theatre Corp. v. Douglas Theatre Co., supra* 585 F.2d at 893. Additionally, "the damages accruing from the injury must be capable of reasonable ascertainment and must not be speculative or conjectural." *Id.* Yet, even with this caution in regard to ascertainment of damages — "the jury may not render a verdict based on speculation or guesswork," *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S. Ct. 574, 579-580, 90 L.Ed. 652 (1946) — the Supreme Court has also stated

> in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injury plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.
>
> * * * [T]he jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances "juries are allowed to act upon probable and inferential, as well as direct and positive proof."

Id., quoting Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 564, 51 S.Ct. 248, 251, 75 L.Ed. 544 (1931). *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

More recently, the Supreme Court has stated in regard to the causal injury requirement:

> [The plaintiffs] burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of

some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4.

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 1571, 23 L.Ed.2d 129 (1969).[19]

A. *Sherman Act § 1, Fact of Injury and Causation*

We first examine the fact of injury and causation requirements with reference to the Sherman 1 claim. This division between the section 1 claim and the section 2 claim is analytically necessary because the effect under section 1 (of the violation) is relevant in determining the reasonableness of the restraint of trade.

The Special Master found, with respect to the Sherman § 1 claim,

43. Travel Center, another locally based travel agency, after September 16, experienced a sharp drop in the quantity and rate of bookings and requests for promotional literature on the Hawaii TGCs it had been advertising. As a result of the effects of the Western ad, Travel Center had to promote group travel through companies and organizations as it had done before TGCs came into existence in order to fill the flights it had booked, in effect, converting its TGC flights to split-charter flights.

44. Customer sign-ups and inquiries on Mainline's Hawaii TGCs, first advertised on August 12, 1973, declined after the publication of the ad.

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19. *See also Foremost International Tours, Inc. v. Qantas Airways, Ltd.*, 478 F.Supp. 589, 595 (D.Hawaii 1979) ("The court assumes that plaintiff, if it could demonstrate the violations alleged, would sustain some form of cognizable antitrust injury as a result of such violations, plaintiff being in direct competition with the defendants in the relevant market.").

45. Customer sign-ups and inquiries on the ITA/MSAA-sponsored TGCs, first advertised on September 2, 1973, increased after publication of the ad. [The Special Master noted in his memorandum that "although MSAA's TGC requests increased slightly, this may be attributable to a normal delay in response to ITA's advertisements of its TGC program."]

* * * * *

56. Requests from travel agents for blocks of seats on Mainline's Hawaii TGCs decreased significantly immediately following the mailing of the "Dear Partner in Travel" letter and the publication of the ad.

There is sufficient evidence in the record to support all these findings.

Additionally, the Special Master found that Western's anti-TGC campaign was the cause of the decrease in public interest in TGCs. This is supported by testimony that immediately after the September 16 ad appeared, there was generally a drop in inquiries, bookings, requests, etc., concerning TGCs. Similar testimony was given concerning requests from travel agents after the letter, including a copy of the ad, was mailed. Also, there was testimony that there were questions by the general public concerning the appearance of the ad and asking questions about the ad.

This general showing of a decrease in favorable inquiries concerning the TGCs, combined with the showing of the degree of success of TGCs in the past is sufficient to demonstrate a significant fact of injury causally related to the anti-TGC campaign. Further, the negative effects of the anti-TGC campaign support our earlier finding of a section 1 unreasonable restraint of trade. In addition, of course, these effects establish causation of injury sufficient to satisfy a section 1 private cause of action claim.

B. *Sherman Act § 2, Fact of Injury and Causation*

As to the Sherman Act § 2 claim, the above discussion concerning the decrease in TGC requests is applicable, as the section 1 claim is enveloped within the section 2 claim.

MSAA's cancellation as wholesaler for ITA's TGCs clearly, by itself, created injury. The Special Master found:

> 68 MSAA and ITA committed themselves to plans to operate four TGCs to Hawaii in 1974. The four MSAA/ITA TGCs to Hawaii had been advertised at the time Western published its ad in the Twin Cities papers. ITA could not market these TGCs without the assistance of MSAA.
>
> 75. ITA and MSAA had also firmly committed themselves to running four TGCs to Mexico in the first quarter of 1974, and, in fact, they had begun advertising them prior to the time Western published its anti-TGC ad in the Twin Cities. Because of Western's conduct, MSAA cancelled these TGCs. ITA could not market these TGCs without MSAA's assistance.
>
> 82. At the time Western published its anti-TGC ad in the Twin Cities, MSAA planned to run 13 TGCs to London in 1974 with ITA. These 13 TGCs constituted a program distinct and independent from the TGCs to Europe that ITA planned to run and actually did run on its own in 1974.
>
> 83. Because of Western's conduct, MSAA cancelled these TGCs. Absent Western's conduct, all 13 TGCs to London would probably have operated successfully. ITA suffered a loss of profits and its damages are not difficult to ascertain.

The section 2 causation issue was implicitly discussed in Part VI, *supra*; the willful maintenance of the monopoly (the threat at the meeting) and the unreasonable restraint of trade (the effects of the anti-TGC campaign) caused the cancellation of the TGCs by MSAA.

C. *Damages*

As to the issue of damages, Western does not dispute the method for calculating damages nor does Western dispute the amount. The disputed issue is whether or not, but for

these activities, the TGCs would have succeeded. In other words, by deciding that but for the antitrust violations the TGCs would have succeeded, did this result in a just and reasonable estimate of the damages.

Western particularly argues that the London flights were not firmed up and thus giving damages for these flights was speculative. As the Special Master states in his Memorandum of Law, "[w]hile plans for the London TGCs had not been firmed up at the time MSAA cancelled, this was not because of the parties' lack of interest but rather because of their preoccupation with Mexico and Hawaii TGCs. This preoccupation is understandable in view of the fact that the Mexico and Hawaii TGCs were scheduled for the winter of 1974, while the London TGCs were not to depart until the following summer."

As the Fifth Circuit stated in *Heatransfer Corp. v. Volkswagenwerk, A. G.*, 553 F.2d 964, 986-89 n.20 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978) and as quoted by our court in *TV Signal Co. v. AT&T*, 617 F.2d 1302 (8th Cir. 1980):

> [T]he Court does not believe that a going concern, which is the victim of an anti-competitive practice, must forego damages for sales it would have made as the result of the natural expansion of its business simply because it was victimized early in its existence before its attempts to expand could ripen into evidence of preparedness and intent to increase its output. Thus, the question for the Court's determination is whether, under the facts of the present case, the manufacture of units for each type of Volkswagen vehicle in the relevant market can be considered the expansion of a present business into a new market for purposes of standing, *or simply one facet of growth in an ongoing business for purposes of damages.* The line to be drawn between expansion into new areas and growth in established ones is not easily defined and one that must be determined from the facts of each case.

Id. at 1308.

Also, Western argues that it did nothing to interfere with the proposed London TGCs — that Western did not

serve London and did not care whether MSAA or anyone else sponsored TGCs to London. The record clearly shows that Western had engaged in an anti-TGC campaign and that this had an effect on TGCs over all; and that the overall effect on TGCs was one of the reasons that led MSAA to cancel its participation in the ITA TGC program. Finally, the Special Master found that the pressure applied at the September 25 meeting was in regard to all TGCs with ITA.

Based upon evidence of (1) past successes of TGCs; (2) increasing demand for vacation travel to Hawaii, Mexico and London; and (3) success of subsequent, albeit not necessarily the same type of charters, the Special Master concluded that the flights would have been successful. Thus, in accord with the Supreme Court's language in *Bigelow v. RKO Radio Pictures, Inc., supra,* 327 U.S. at 264, 66 S.Ct. at 579:

> [T]he jury [in this case, the Special Master] could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiff's business, and from the evidence of the decline in prices, profits and values, *not shown to be attributable to other causes,* that defendants' wrongful acts had caused damage to the plaintiffs.

Id. (emphasis added).

We hold that there is sufficient evidence to support the Special Master's findings in regard to damages.

VIII. Attorney's Fees

Finally, Western contends the attorneys' fees awarded by the district court were excessive. ITA was awarded attorneys' fees of $213,390.87. This represents an award for the services of lead counsel Harold J. Tomin of $144,914.00; and an award for the services of Doherty, Rumble & Butler (Doherty), who acted as local counsel, of $68,476.87. This, together with costs of $10,771.40 and trebled damages of $361,596.00 resulted in a total award by the district court to ITA of $585,758.27.

Western's contentions concerning the excessiveness of attorneys' fees can be summarized as follows: (1) the hours and hourly rate awarded Tomin were excessive; (2) the hours and hourly rate awarded Doherty were excessive, and the use of a contingency multiplier was improper; and (3) the contingency fee agreement between ITA and its counsel resulted in such a large amount of fees actually being paid to its attorneys by ITA, that this court should reduce that amount by exercising its supervisory powers over the bar.

We begin by examining the Special Master's award of reasonable attorneys' fees pursuant to 15 U.S.C. § 15.[20] In *Grunin v. International House of Pancakes,* 513 F.2d 114 (8th Cir.), *cert. denied,* 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975), this court agreed that the proper approach in determining an award of attorney's fees in antitrust cases is the approach used in the Second and Third Circuits. The factors to consider are:

a) the number of hours spent in various legal activities by the individual attorneys,

b) the reasonable hourly rate for the individual attorneys,

c) the contingent nature of success, and

d) the quality of the attorneys' work.

Id. at 127. *See Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.,* 487 F.2d 161 (3d Cir. 1973) *(Lindy I), appeal from decision on remand,* 540 F.2d 102 (3d Cir. 1976) *(Lindy II). See also City of Detroit v. Grinnell Corp.,* 495 F.2d 448 (2d Cir. 1974) *(Grinnell I), appeal from decision on remand,* 560 F.2d 1093 (2d Cir. 1977) *(Grinnell II)*; *Merola v. Atlantic Richfield Co.,* 493 F.2d 292 (3d Cir. 1974).[21]

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20. The district court adopted all of the Special Master's findings and conclusions concerning the award of attorneys' fees, except that it corrected a mathematical error. *International Travel Arrangers v. Western Airlines, Inc.,* No. 4-74 Civil 256 (D.Minn. Feb. 26, 1979).

21. Other factors which might be considered appear in *Morning Pioneer, Inc. v. Bismarck Tribune Co.,* 493 F.2d 383, 390 n.15 (8th Cir. 1974). *See also Locklin v. Day-Glo Color Corp.,* 378 F.Supp. 423, 426 (N.D.Ill. 1974).

Although the above cases involved class actions in antitrust cases, we agree that "the principles of *Lindy* are applicable to an award of attorney's fees pursuant to 15 U.S.C. § 15," *Pitchford v. Pepi, Inc.*, 531 F.2d 92, 110 (3d Cir.), *cert. denied*, 426 U.S. 935, 96 S.Ct. 2649, 49 L.Ed.2d 387 (1976).

The starting point in determining attorney's fees is to arrive at a "lodestar" figure by multiplying an hourly rate by the number of hours worked. It is only after this calculation is made that less objective factors may be applied. *Grunin v. International House of Pancakes, supra*, 513 F.2d at 127-28; *Lindy II, supra*, 540 F.2d at 116-17; *Grinnell I, supra*, 495 F.2d at 470.

The purpose of the fees award under 15 U.S.C. § 15 is to insure that a successful plaintiff in an antitrust action does not have its treble damage recovery unduly diminished by the payment of fees to its attorneys. *Perkins v. Standard Oil Co.*, 47 F.42d 549, 553 (9th Cir.), *cert. denied*, 412 U.S. 940, 93 S.Ct. 2778, 37 L.Ed.2d 400 (1973); *Farmington Dowel Products Co. v. Forster Manufacturing Co.*, 421 F.2d 61, 88 (1st Cir. 1970); *Locklin v. Day-Glo Color Corp.*, 378 F.Supp. 423 (N.D.Ill.1974). Recovery of attorney's fees under 15 U.S.C. § 15 of course accrues to the plaintiff and not its attorneys. *First Iowa Hydro Electric Coop. v. Iowa-Illinois Gas & Electric Co.*, 245 F.2d 630-32 (8th Cir. 1957), *cert. denied*, 355 U.S. 871, 78 S.Ct. 122, 2 L.Ed.2d 76 (1958).

The standard applied by this court in reviewing a 15 U.S.C. § 15 attorney's fees award is whether the district court's findings were clearly erroneous as to the factual basis for the award, or whether it committed abuse as to the discretional margin involved in its allowance. *Armco Steel Corp. v. State of North Dakota*, 376 F.2d 206, 212 (8th Cir. 1967). *See Grunin v. International House of Pancakes, supra*, 513 F.2d at 126. Nevertheless, "it is the duty of appellate courts to protect against 'vicarious generosity' in the matter of attorney fees [in antitrust cases]." *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846, 859 (8th Cir.), *cert. denied*, 343 U.S. 942, 72 S.Ct. 1035, 96 L.Ed. 1348 (1952). *Cf. Locklin v. Day-Glo Color Corp., supra*, 378 F.Supp. at 426. ("Over-generosity, in

particular, must be guarded against so as to maintain public respect for and confidence in the organized bar.").

In cases involving substantial actual damages, courts test the reasonableness of the attorney's fees award by examining the ratio of the attorney's fees to the untrebled damage award. *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., supra,* 194 F.2d at 859; *Milwaukee Towne Corp. v. Loew's, Inc.,* 190 F.2d 561, 571 (7th Cir. 1951), *cert. denied,* 342 U.S. 909, 72 S.Ct. 303, 96 L.Ed. 680 (1952). The attorneys' fees awarded by the district court are $213,390.87, which is approximately 177% of the untrebled damage award of $120,532.00. While we reject a per se rule applied by some courts that the attorney's fees award should be limited to the amount of the untrebled damages,[22] the high ratio is a factor to consider and requires a close examination of the fee award.[23]

A. *Fees Awarded for Services of Harold Tomin*

Harold Tomin has served as lead counsel for ITA in this action. This is his first trial of an antitrust case as lead counsel, although he has participated in the preparation,

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22. This court has stated only that the fee must bear a reasonable relationship to the amount of untrebled damages. *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.,* 194 F.2d 846, 859 (8th Cir. 1952).

We note that at least one court has approved an award of attorney's fees which far exceeded the substantial untrebled damage figure. *Pitchford Scientific Inst. Corp. v. Pepi, Inc.,* 440 F.Supp. 1175 (W.D.Pa. 1977), *aff'd,* 582 F.2d 1275 (3rd Cir. 1978).

23. In reviewing the award of attorneys' fees, this court has expressed the following caveat:

> A party is not entitled needlessly to accumulate exorbitant legal fees with the expectation that the losing party will be called upon to pick up the entire tab. This court will exercise vigilance and pare down needless and unconscionably high legal fees. An award of attorney's fees is compensatory, not punitive.
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> * * *

Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action, 558 F.2d 861, 871 (8th Cir. 1977) (award of attorney's fees pursuant to 42 U.S.C. § 1988).

trial, and settlement of a number of antitrust cases. When he began this case he had been practicing law for over eight years, and had approximately twelve years of legal experience at the time of trial. The Special Master found "he demonstrated the ability of a competent and skillful trial attorney."

Tomin, from the Los Angeles area, stated his normal billing charge during that period varied from $75.00 to $90.00 per hour. The evidence indicated that in Minneapolis-St. Paul the rate would be lower for someone with his experience. Western also argues that he should be paid at the rate at the time he earned it, and notes the rates were much lower in 1974. *See Locklin v. Day-Glo Color Corp., supra,* 378 F.Supp. at 427. However, it is our view that such analysis or review would then require detailed examination of other factors (such as the inflationary shrinkage since the time the work was performed) and that it was therefore reasonable for the Special Master to conclude $80.00 per hour was a reasonable "lodestar" fee for Tomin. The Special Master then awarded a $10.00 per hour bonus for the contingency nature of the case, and we cannot say this was an abuse of discretion.

Tomin claimed 1699 hours were expended by him, and the Special Master awarded ITA fees based on 1572.85 hours. We conclude the trial court was clearly erroneous in finding Tomin contributed this many hours when time records were kept for only 772.75 hours. While we do not disallow all reconstructed hours, we believe the court in *Kane v. Martin Paint Stores, Inc.,* 439 F.Supp. 1054 (S.D.N.Y. 1977), *aff'd,* 578 F.2d 1368 (2d Cir. 1978) properly held that uncertainties should be resolved against the plaintiff, if arising because of imprecise recordkeeping without adequate justification. The record supports the Special Master's finding that for the period of February 1974 through May 1974 Tomin was associated with a firm that dissolved and the records were unavailable. A similar conclusion is reached for the period from August 1975 through January 1976. We cannot say the Special Master's findings as to the time allowed for these periods are clearly erroneous. Additionally, we will not reduce as ex-

cessive the hours for which records were properly kept and introduced at the hearing before the Special Master.

A similar conclusion cannot be made concerning other periods, however. From April through June 1977, Tomin's records indicated he spent 77.5 hours on the case, but he asked the court for 450 hours and was awarded 350 hours. Because of his lack of records, and based on the affidavit of defendant's counsel concerning the time needed for pretrial activity (120.5 hours for defense counsel), we conclude 150 hours is all that could be found to be reasonable for this period.

The Special Master awarded 250 hours for trial time. We find it unreasonable to assume Tomin spent more than 200 hours, again based on affidavits of defendant's counsel (182 hours recorded trial time) and the fact the only evidence of Tomin's hours are records apparently reconstructed six months later.

Western also claims it should not be penalized for ITA hiring counsel from Los Angeles, and seeks to have travel time between Los Angeles and Minneapolis excluded. Tomin has charged travel time for at least ten round trip flights billing twelve or more hours of time for each round trip. We would not disallow all travel time (the magistrate excluded two trips), but it is our view that defendant should not be charged a premium for ITA's choice of out of town counsel, *Kane v. Martin Paint Stores, Inc., supra,* 439 F.Supp. at 1056. The award will be reduced by fifty hours due to insufficient evidence the flight time involved work on this case. *See Locklin v. Day-Glo Color Corp., supra,* 378 F.Supp. at 429-30.

We therefore conclude a reasonable award of fees for Tomin's services would require a reduction of 300 hours from the Special Master's findings. As a result ITA should receive an award of $117,914.00 as reasonable attorney's fees for Tomin's work, based on the trial court's award of $144,914.00 less $27,000.00 (300 hours × $90.00 per hour).

B. *Fees Awarded for Services by Doherty, Rumble & Butler*

As local counsel for ITA, Doherty, Rumble & Butler received fees of $68,476.86. This was based on hourly fees multiplied by the hours worked for a total "lodestar" amount of $43,089.75. The Special Master then multiplied the lodestar amount by a factor of 1.5 based on the contingency nature of the work and its quality. Doherty kept precise records, and we do not question the Special Master's award of hours, nor the hourly rate determinations.[24] However, we think it was unreasonable to award Doherty a 1.5 multiplier in this case.

As the Third Circuit has explained,

> Any increase or decrease in fees to adjust for the quality of work is designed to take account of an unusual degree of skill, be it unusually poor or unusually good. * * * [T]he increase or decrease reflects exceptional services only; it may be considered in the nature of a bonus or penalty. The heavy burden of proving entitlement to such an adjustment is on the moving party.

Lindy II, supra, 540 F.2d at 118. *See also Grinnell II, supra,* 560 F.2d at 1100. The Special Master's conclusory language about quality of work and the risk involved does not satisfy this requirement. *Grinnell II, supra,* 560 F.2d at 1100. The majority of the risk in this case was with Tomin, and the Special Master reasonably applied to his hourly rate a $10.00 per hour bonus factor, which is about a 12.5% increase in the hourly rate. Pursuant to a normal fee arrangement, ITA had paid Doherty approximately $3,800.00 in attorney fees and $3,000.00 in disbursements up to July 12, 1977, the time of the trial. At that time ITA and Doherty agreed future attorney fees for trial work were contingent on success, and would be the amount awarded by the court pursuant to 15 U.S.C. § 15. In any

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24. The Special Master made the following rate determination for members of Doherty: The principal participating attorney, Boyd Ratchie, $75.00 per hour; senior partners, $90.00 per hour; associates $35.00-$55.00 per hour; and assistants, $16.00-$29.00 per hour.

event, the firm was to be reimbursed for necessary expenses it incurred.

The 1.5 multiplier as a bonus to the hourly rate would result in some of the Doherty attorneys receiving in effect $135.00 for their services ($90.00 × 1.5). Additionally, Boyd Ratchie, who served as second chair in the case and was inexperienced in antitrust litigation, would have been compensated in effect at a rate of $112.50 per hour ($75.00 × 1.5). ITA has not met the heavy burden of proving entitlement to such an adjustment. *Lindy II, supra,* 540 F.2d at 118. We therefore find it excessive and reduce the award to the straight-time figure of $43,089.75.[25]

C. *Contingency Fee Agreement Between ITA and Its Counsel*

The private contingency fee agreement between ITA and its counsel requires separate consideration. The court has the power and the responsibility to monitor contingency fee agreements for reasonableness. ABA Canons of Professional Ethics No. 13; *Dunn v. H. K. Porter Co.,* 602 F.2d 1105, 1108-09 (3d Cir. 1979); *Farmington Dowel Products*

25. Western asks that we disallow time spent on the jury trial before the magistrate, and make further reductions for duplications of effort because two firms were involved in the work. With regard to this latter point, this court will not interfere with the decision of ITA and its two counsel to divide the burdens of a complex trial between the counsel. *See Computer Statistics, Inc. v. Blair,* 418 F.Supp. 1339, 1351 (S.D.Tex. 1976). Concerning the jury trial which was later ruled invalid by the district court, we note both parties stipulated to the jury trial. While we disagree with the contention of ITA that the jury trial did not require more attorney time than would a bench trial, we do agree ITA should not be denied this time simply because a higher court ruled the jury trial invalid. As stated in *Pitchford Scientific Inst. Corp. v. Pepi, Inc., supra,* 440 F.Supp. at 1178 (footnote omitted)

> [we reject] defendants' contention that because the case was tried twice counsel is not entitled to compensation for work done at the second trial, on the theory that such work was "duplication." It seems clear that it is reasonably necessary to retry a case when an appellate court directs a retrial. Counsel are not to be penalized by being required to work for nothing as punishment for failure to know at the first trial what the Court of Appeals was going to do.

Co. v. Forster Manufacturing Co., supra, 421 F.2d 61 (1st Cir. 1970) *(Farmington Dowel I), appeal of decision on remand,* 436 F.2d 699 (1st Cir. 1970) *(Farmington Dowel II).*

We feel that under the circumstances of this case we must examine the reasonableness of the fee agreement. Tomin testified at the hearing before the magistrate with regard to his fee arrangement with ITA, and at oral argument before this court explained the manner in which his fee was determined. We have inserted the figures awarded under 15 U.S.C. § 15 into this formula, and have made the following approximations: From the total award (treble damages plus costs and attorneys' fees), which adjusted by our reductions in attorneys' fees is $533,371.15, is deducted the fees for Doherty, Rumble & Butler ($43,089.75) and costs and expenditures in the case made by ITA (estimated by Tomin to be $30,000.00). Tomin is to receive 45% of this remaining figure, $460,281.40, or approximately $207,126.63. Doherty, Rumble & Butler agreed to receive only what the court awards ITA for the services of the firm, which is $43,089.75.

These computations indicate that the attorneys altogether will take home approximately $250,000.00 of the total award of $533,371.15. This is 47% of the total award going to the attorneys.

The role of the court in awarding a reasonable fee under 15 U.S.C. § 15, and in exercising its supervisory power over the bar by examining contingency agreements between attorney and client, differs greatly.

> The first requires the court to arrive at a figure it considers reasonable; the second requires it to arrive at a figure which it considers the outer limit of reasonableness. The first determination is made without reference to any prior agreement between the parties; the second must take account of the fact that an agreement, if freely made, is not lightly set aside.

Farmington Dowel I, supra, 421 F.2d at 90. Our inquiry here is therefore limited to whether the fee agreement yields a fee which is "[beyond the] outer limit[s] of reasonableness." *Id.*

There are several factors to consider in determining reasonableness for the purposes of the Canons of Ethics, many of which have little applicability for purposes of an award pursuant to 15 U.S.C. § 15. We examine, *inter alia*, the reasonableness of the fee arrangement according to the circumstances in which it was made, the fact it is contingent on success, the status of sophistication of the plaintiffs, and whether the plaintiff remains willing to abide by the contract.[26] One factor not conclusive is that the contingency fee agreement — formulated to satisfy needs other than those contemplated by 15 U.S.C. § 15 — exceeds the section 15 award. *Dunn v. H. K. Porter Co., supra,* 602 F.2d at 1112.

In examining all the relevant factors, we note that Doherty, Rumble & Butler is receiving only its reasonable fees under 15 U.S.C. § 15 ($43,089.75) and the court finds no reason to intrude in its fee arrangement with ITA. In fact, we agree with the Third Circuit "that the courts should be loathe to intrude into a contractual relationship between an attorney and client." *Id.*[27]

We are also reluctant to intrude in the agreement entered into between Tomin and ITA. Tomin's fee arrangement results in his being paid approximately 39% of the total award ($207,000.00 of $533,371.15) which he contends is in line with normal contingency rates. There is no question, however, that his award must be considered in light of the fact other attorneys' fees were also being paid by ITA to Doherty for its involvement in the case. The fact that 47%

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26. *See, e.g., Dunn v. H. K. Porter Co.*, 602 F.2d 1105, 1110 (3d Cir. 1979); *Farmington Dowel I, supra,* 421 F.2d at 89-90. *See also* ABA Canons of Professional Ethics No. 12; ABA Code of Professional Responsibility DR 2-106(B).

27. The First Circuit has reaffirmed its belief that " 'court intervention in fee dispositions is bound to be confined to exceptional circumstances.' In [*Farmington Dowel II*] we set a high standard for a showing of reasons for 'the court's decision to declare less than the amount resulting from the fee agreement as the maximum which could ethically be received.' " *Sargeant v. Sharp,* 579 F.2d 645, 648 n.4 (1st Cir. 1978) (quoting *Farmington Dowell II, supra,* 436 F.2d at 701).

of the substantial total award will be paid to attorneys is disturbing. We reiterate that the major purpose for the statutory award for attorney's fees was to prevent substantial diminution of the plaintiff's trebled damage recovery. *Farmington Dowel I, supra,* 421 F.2d at 88 n.60. That the client freely entered into the contract and is apparently willing to abide by it is relevant but not controlling. *Id.* at 89 n.61.

We conclude the fee agreement between ITA and Tomin results in a fee which exceeds the outer limits of reasonableness. Without rejecting the formula used by Tomin in all cases, considering the fees awarded other counsel and the substantial damage award,[28] our supervisory power requires us to reduce the fee which ITA must pay Tomin pursuant to its contingency fee agreement.

Our examination of the circumstances of this case leads us to conclude that the outer bounds of reasonableness require that the fee paid by ITA to Tomin under their contingency fee agreement be limited to 45% of the treble damage award of $361,596.00. This is approximately $162,718.20, as compared with the $207,126.63 fee we computed *supra* to be his fee according to the agreement.[29]

In view of the issues raised on appeal, and our disposition of these issues, ITA will be awarded $5,000.00 pursuant to 15 U.S.C. § 15 as a reasonable sum for attorneys' fees in defending its verdict on appeal. *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.,* 368 F.2d 679, 692 (8th Cir. 1966) (Blackmun, J.). *See also Carpa, Inc. v. Ward Foods,*

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28. It has been noted that

> [a] fair and equitable contingent fee agreement generally provides for a sliding scale in which fees based on a percentage of the total recovery decrease as the amount of the recovery increases. *See Pollard v. United States,* 69 F.R.D. 646, 649 (M.D.Ala. 1976); *Milstein v. Werner,* 58 F.R.D. 544, 551-52 (S.D.N.Y. 1972); *State of Illinois v. Harper & Row Publishers, Inc.,* 55 F.R.D. 221, 223 (N.D.Ill. 1972).

Dunn v. H. K. Porter Co., supra, 602 F.2d at 1113 n.12.

29. Of course the attorney's fees awarded ITA by the court for the services of Tomin under 15 U.S.C. § 15 ($117,914.00) can be used to satisfy the contingent fee.

Inc., 536 F.2d 39, 55-56 (5th Cir. 1976); *Farmington Dowel I, supra*, 421 F.2d at 91-92. In addition court costs on appeal are awarded to ITA and against Western.

We affirm the district court's conclusion that Western violated the Sherman Act §§ 1 and 2; we affirm the damages awarded to ITA. We reduce the attorneys' fees for the reasons discussed above.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

INTERNATIONAL TRAVEL ARRANGERS *Plaintiff* *vs.* WESTERN AIRLINES, INC. *Defendant*	No. 4-74 Civil 256 JUDGMENT

This matter comes before the Court upon the findings of fact and conclusions of law, and recommendations of United States Magistrate Robert G. Renner acting as Special Master pursuant to 28 U.S.C. § 636(b)(2), and the Stipulation for Entry of Judgment of the parties filed on February 23, 1979.

It is ordered and adjudged that plaintiff International Travel Arrangers, Inc. recover against defendant Western Airlines, Inc., $585,758.27 inclusive of treble damages in the amount of $361,596.00, reasonable attorney's fees of $213,390.87, and costs of suit of $10,771.40 with interest thereon at the rate of 6% as provided by law.

DATED: February 26, 1979

MILES W. LORD
Miles W. Lord
United States District
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

INTERNATIONAL TRAVEL ARRANGERS, a corporation, *Plaintiff*, *vs.* WESTERN AIRLINES, INC., *Defendant.*	Civil 4-74-256 ORDER FOR JUDGMENT

Doherty, Rumble & Butler, by Boyd Ratchye and Stephen Halper, E-1500 First National Bank Building, St. Paul, MN 55101; Harold Tomin, 6th Floor, 1888 Century Park East, Los Angeles, CA 90067.

Mackall, Crounse & Moore, by Clay Moore, 1000 First National Bank Building, Minneapolis, MN 55402.

This matter comes before the Court upon the findings of fact, conclusions of law, and recommendation of United States Magistrate Robert G. Renner, acting as a Special Master pursuant to 28 U.S.C. § 636(b)(2).

The court, having received objections of defendant and plaintiff thereto, considering them fully, and determining them to be without merit, adopts the findings of the Magistrate with the exception that Finding No. 60 is stricken. The Court accepts the Recommendation of Magistrate Renner.

Pursuant thereto, IT IS ORDERED That:

1. The Clerk enter judgment for plaintiff International Travel Arrangers and against defendant Western Airlines, Inc., in the total amount of $361,596, together with interest from the date hereof; and

2. Plaintiff be awarded attorney fees in an amount to be determined by the Magistrate following a hearing for that purpose to be held within 60 days.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: October 17, 1978

MILES W. LORD

Miles W. Lord
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

INTERNATIONAL TRAVEL ARRANGERS, a corporation, *Plaintiff,* *vs.* WESTERN AIR LINES, INC., *Defendant.*	REPORT OF THE SPECIAL MASTER: FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER FOR JUDGMENT Civil 4-74-256

The above-entitled action came on for a new trial before the undersigned United States Magistrate on April 24, 1978. By stipulation of the parties and by Order entered thereon, the undersigned acted herein as Special Master pursuant to 28 U.S.C. Section 636(b)(2). The parties waived a jury trial.

Plaintiff was represented by Harold J. Tomin, and by Boyd Ratchye and Stephen Halper of the firm Doherty, Rumble & Butler. The defendant was represented by Clay R. Moore of the firm Mackall, Crounse & Moore.

This action was previously tried from July 13 to August 4, 1977, to a jury before the undersigned, and a verdict returned in the plaintiff's favor. No judgment thereon was entered. On February 22, 1978, defendant's motion for a new trial was granted by United States District Court Judge Miles W. Lord on the grounds that the reference to the undersigned for purposes of the jury trial was unlawful. The procedure to be followed on this new trial was

stipulated in writing, said stipulation being part of the record.

Based on the evidence of record and, having heard and considered the arguments of counsel, the undersigned hereby renders his report as Special Master and makes the following Findings of Fact, Conclusions of Law, and Recommended Order for Judgment.

FINDINGS OF FACT

1. **Definitions:**

a. *Travel Group Charter.* Ordered effective by the Civil Aeronautics Board (CAB) in September 1972, the Travel Group Charter (TGC) is a form of charter air travel in which the individual traveler is a party to the charter contract incurring liability for the pro rata share of the charter costs and running the risk that his cost may increase, depending upon the load factor ultimately achieved. TGCs are organized by independent charter organizers. The TGC rules were amended many times between initial enactment and the time of trial. During the time period involved in this lawsuit, the rules contained provisions relating to time of sign-up, penalty-free cancellation, and related matters. In enacting the TGC concept, the CAB's purpose was to provide charter competition to the regularly-scheduled airlines, and low air fares to the public at large.

b. *Single-Entity Charter.* A single-entity charter involves the engagement of an aircraft by one person for the transportation of others who pay nothing.

c. *Affinity Charter.* Affinity charters involve groups having some community interest apart from transportation, for example, membership in a club, who engage an aircraft for transportation to be paid for on a pro-rata basis.

d. *Inclusive Tour Charter.* Inclusive tour charters involve the charter of an aircraft by an entrepreneur who offers space to the public as part of an all-expense paid tour. Inclusive tour charters are subject to restrictions promulgated by the CAB such as seven-day minimum be-

tween departure and return, a minimum of three stops, and a requirement that the tour package price be no less than 110 percent of the lowest available fare charged by scheduled air carriers for comparable individually ticketed travel.

2. **The Parties.**

a. *International Travel Arrangers.* International Travel Arrangers (ITA) is a Minnesota corporation engaged in the business of organizing and arranging charters. ITA was formed in June of 1972 by Steven Russell and Jerry Hazzard who, to this date, remain its operating officers and majority shareholders.

Although ITA's initial business was limited to packaging of affinity group charters, ITA entered the market of organizing and arranging TGCs upon promulgation by the CAB of regulations governing TGCs.

b. *Western Air Lines.* Western Air Lines, Inc. (Western) is a Delaware corporation and is a CAB certificated, regularly-scheduled airline whose routes insofar as relevant here include Minneapolis-St. Paul and other mainland cities/Hawaii, Minneapolis-St. Paul/Las Vegas and various western states cities/Mexico.

3. At all relevant times, both Western and ITA were engaged in interstate commerce. Western's conduct affected interstate commerce by affecting the movement of persons by air from Minnesota and surrounding states to Hawaii, Mexico, and Europe.

4. On January 7, 1972, the CAB published a Notice of Proposed Rule Making submitting for public comment regulations which provided for a new type of charter in air transportation, TGC. The proposed TGC regulations were novel in that they stressed reliance on travel factors rather than non-travel affinity to distinguish the charters from scheduled individually-ticketed air travel. On September 27, 1972, the CAB adopted the proposed regulations with minor modifications.

5. In response to the regulations issued by the CAB, ITA filed the necessary documents to organize and arrange

TGCs. ITA's filing was the first received by the CAB, TG 72-1. The program operated in the summer of 1973 from Minneapolis-St. Paul to London. The Minnesota State Automobile Association (MSAA) acted both as a wholesaler and retailer of the TGCs organized and arranged by ITA.

6. Although only three flights were originally scheduled, the London program was so successful that additional prospectuses were filed with the CAB and seven flights were operated that season.

7. ITA, as early as January 1973, began discussions with MSAA for a greatly expanded 1974 TGC program. Final plans were for ITA to organize TGCs for the 1973-1974 winter to Hawaii and Mexico, and for summer, 1974, to Europe with MSAA acting as wholesaler, retailer, and administrative functionary (i.e., reservations and booking).

8. Early in 1973, ads appeared in west coast newspapers advertising TGCs to Hawaii. Western viewed these TGCs as a competitive threat to its regularly scheduled air service between the west coast and Hawaii. Western had decided not to provide aircraft for TGCs, in part, because of its general shortage of aircraft.

9. Batten, Barton, Dirsten and Osborne (BBD&O) was at all relevant times engaged in the advertising business. BBD&O and Western were at all relevant times separate and independent legal entities. Between 1970 and 1974, Western was the largest of six accounts at the Los Angeles office of BBD&O.

10. In January of 1973, Bert Lynn, Western's vice president for advertising and promotion, made the decision to seek the help of BBD&O in formulating a response to meet the competitive threat of TGCs operating between west coast cities and Hawaii. Lynn and Willis Balfour, Western's vice president for passenger sales, had agreed that an advertisement would be the best way to meet this competitive threat.

11. Upon contacting BBD&O's John Doyle, Lynn was told that BBD&O had already commenced work on an advertisement discouraging use of TGCs. The person at

BBD&O in charge of the Western account was Jack Bernardy.

12. Although Lynn gave Bernardy general guidelines concerning the ad and reviewed BBD&O's ad copy, the ad as published was the result of BBD&O's active participation and was substantially the work product of BBD&O.

13. Western caused the ad to be published in February 1973 in newspapers in major west coast cities, including Los Angeles, Long Beach, San Francisco, San Jose, Oakland, and Sacramento (Ex. 53).[1]

14. The ad effectively reduced competition from TGCs on the west coast.

15. By April 1973, Western's Minneapolis personnel had been instructed by Balfour to monitor TGC activity in the Twin Cities as closely as possible.

16. On April 25, 1972, Balfour wrote Warren Phillips of Mainline Travel, a Minneapolis based travel agency, for the purpose of persuading Phillips not to participate in TGCs (Ex. 44).

17. In a letter to Balfour dated August 14, 1973 (Ex. 47), Lynn Zumbrunnen, Western's regional director in Minneapolis, stated that TGC programs scheduled to depart the Twin Cities during the first quarter of 1974 created a "very serious competitive situation" which should be met by a "positive reaction" by Western prior to the middle of September. The letter stated that:

> This successful reaction would be a rerun of our TGC advertisement which appeared in the Los Angeles area tailored to the situation. In addition to the ad, a direct mail program regarding the same would be sent to all travel agencies.

18. On August 23, 1973, at a meeting of the Travel Agent Advisory Committee in the Twin Cities, Balfour stated that Western was opposed to TGCs. Balfour felt that

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1. Plaintiff's exhibits are marked numerically; defendant's exhibits are marked alphabetically. They are referred to throughout by letter or number only.

Hawaii TGCs from the Twin Cities would be more successful than the west coast TGCs and thus more harmful to Western. His reasons for so feeling were substantial, the most important being the likely participation of MSAA and Mainline whose retail travel agency operations were the two largest in Minnesota. Whereas these two "partners," as Western liked to think of travel agents, had previously been substantial contributors to Western's regularly scheduled service to Hawaii, they would now be offering a competitive service and thus could be expected to promote that service to the detriment of Western's scheduled service.

19. During summer 1973, upon realizing that TGCs to Hawaii constituted a competitive threat to Western's regularly-scheduled service between the Twin Cities and Hawaii, Western contacted BBD&O and instructed them to revise the west coast ad and conform it to facts relating to the Twin Cities.

20. On September 16, 1973, in response to the substantial competitive threat, Western caused the publication of an ad similar to its west coast ad in the Twin Cities and other larger cities in Minnesota (Ex. 21). The ad appeared in the Travel Sections of the Minneapolis and St. Paul Sunday papers (as well as those of Rochester, Duluth, and other Minnesota cities). As with the west coast ads, it was substantially the work product of BBD&O.

21. It was false, misleading, or deceptive in the following ways:

a. The statement:

> "No travel group charter has even taken off to Hawaii from the Twin Cities. All those scheduled had to be cancelled."

was false and misleading in that if this language is interpreted as stating that all Twin Cities/Hawaii TGCs ever scheduled had been cancelled, it was false since Mainline Travel and MSAA/ITA were advertising Twin Cities/Hawaii TGCs simultaneously with Western's ad and the TGCs had not been cancelled. If the language is interpreted as meaning that all Twin Cities/Hawaii

TGCs scheduled to depart prior to September 16th had been cancelled, it was equally misleading since none had ever been so scheduled.

b. The statement:

> "The upshot of it all being that you can plunk down a couple of hundred dollars (or more) for airfare and even more for ground arrangements. And end up going absolutely nowhere."

was misleading in that under the TGC regulations, it was impossible for a prospective passenger to ever forfeit money paid to the organizer for ground arrangements.

c. The statement: "Find out your hotel (if you buy an optional ground package). Nobody's sure yet either." was false and misleading in that the statement was not true as of the date of the ad for ITA's TGCs. Mr. Russell and Mr. Edberg of MSAA testified that on September 16, a passenger's hotel was known at the time of reservation.

d. The ad was false and misleading in stating that the TGC organizer could charge a five percent transfer fee. By contract ITA could not do so.

e. The ad was false and misleading in stating that the TGC passenger was "virtually out of luck" within 45 days before departure. The standby list could be utilized within 45 days of departure and in fact was so used on ITA's 1973 TGCs to London. For this same reason, the statement "If your boss switches your vacation, for example, you've had it," was misleading.

f. The statement that the travel agent "understands all the pros and cons of Travel Group Charters" was misleading since at the time of the ad travel agents did not know much about the TGC concept. Also, Western was, at the same time, discouraging travel agents from selling TGCs.

g. The statement:

"Nationally, over 2,600 travel group charters have already been cancelled. That's 9 out of 10 flights that were scheduled."

was misleading since this national experience was not representative of the Twin Cities' experience with TGCs. In particular, all of the TGCs scheduled out of Minneapolis/St. Paul to London in 1973 and operated by ITA/MSAA operated successfully. It was also misleading because it referred to flights listed in prospectuses filed with the CAB and was not limited to cancellations occurring because of inability to attract sufficient passengers to allow operations under the Rules, the only circumstance which would be relevant to the alleged informational purpose of the ad.

22. Although the Twin Cities ad was initially scheduled to run at least twice, BBD&O issued the order to cancel it after its first run because of "copy problems."

23. BBD&O also prepared radio advertising discouraging use of TGCs for broadcast on WCCO, the Twin Cities station with the highest listener ratings. It utilized live announcements by some of the station's most popular announcers. (Ex. 106).

24. BBD&O actively and knowingly participated in the Western anti-TGC campaign in Minneapolis and St. Paul in September 1973.

25. BBD&O was at all times aware that the purpose of the campaign was to prevent the TGC from becoming a competitive threat to Western's regularly scheduled air service.

26. BBD&O actively, knowingly, and voluntarily engaged in a course of conduct with Western designed to prevent TGCs from becoming a competitive threat to Western.

27. On September 13, 1973, Western sent to most, if not all, travel agents in Minnesota a letter addressed "Dear Partner in Travel" and signed by Lynn Zumbrunnen, then the regional director at Western's Minneapolis office (Ex. 25).

Enclosed with the letter was a glossy reproduction of the ad to be published in Minnesota newspapers on September 16, 1973. Included in the letter was the following statement:

> ". . . We wonder if the entire travel industry isn't doing itself a good deal of harm to take its prime vacation destination and sell them at bargain basement rates during the period when that product is at peak demand."

28. Western is, and at all relevant times was, the only air carrier with regularly scheduled direct and nonstop service between the Twin Cities and Las Vegas.

29. To compete with Affinity Charters, Western established the Group 60 Fare as a promotional device on its Twin Cities/Las Vegas route.

30. Promotional group fares are designed to stimulate traffic and bring to regularly scheduled service, at least in part, full-plane economies characteristic of charters.

31. Under the Group 60 Fare, Western would allocate to one travel agent, serving as wholesaler and retailer, usually 82 but occasionally 124 seats on a round-trip basis to Las Vegas.

32. Certain days of the week and certain times on those days, were most preferred by Group 60 passengers, and Western knew this. As of September of 1973, Western consistently allocated to MSAA and Mainline the most preferred space to Las Vegas.

33. Travel agent demands for Group 60 seats far exceeded Western's ability to supply them. Western had received complaints from Twin Cities travel agents that the most preferred space on Group 60 flights was unavailable to them since it was consistently allocated to MSAA and Mainline.

34. As of September 1973, MSAA's ability to earn profits on the popular Group 60 Fare to Las Vegas depended upon Western's allocation to MSAA of preferred space on the Group 60 Fare.

35. There was also an economic incentive on the part of travel agents who received Group 60 Fare commitments

from Western to sell them directly to the public rather than wholesaling them through another travel agent. Since Western paid the travel agent a commission (seven percent if air only, 11 percent of the airfare, if ground package included), a travel agent with a Group 60 commitment who sold directly to the public could either pocket the commission or increase demand by lowering the price of his air-ground package.

36. In 1974, Mainline Travel followed the economic incentive and commenced retailing the Group 60 seats Western had committed to it, lowering the package prices. It entirely ceased wholesaling the seats through other travel agents.

37. Western considered travel agents their "partners in travel" since over 50 percent of their gross revenue in 1973 was generated by travel agents.

38. Upon learning of the decision of Mainline to go entirely retail, Western reduced Mainline's preferred allocation of Group 60 seats, thus demonstrating its market power.

39. When Mainline agreed to resume wholesaling, its allocations from Western were increased.

40. The supply imbalance gave Western the market power leverage to impose its wishes on those travel agents already favored or looking to become favored.

41. Western had informed MSAA, at least as early as August 23, 1973, that Western opposed TGCs. MSAA feared that participation in a TGC program would be met with an adverse reaction by Western even before Western commenced its anti-TGC campaign, and as early as the initial 1973 discussions between MSAA and ITA officials concerning a joint TGC program for 1974.

42. After Western began its Minnesota anti-TGC campaign, MSAA feared that its promotion of TGCs which competed with Western might induce Western to respond by reducing preferred allocation on Group 60 space to Las Vegas.

43. Travel Center, another locally based travel agency, after September 16, experienced a sharp drop in the quantity of and rate of bookings and requests for promotional literature on the Hawaii TGCs it had been advertising. As a result of the effects of the Western ad, Travel Center had to promote group travel through companies and organizations as it had done before TGCs came into existence in order to fill the flights it had booked, in effect, converting its TGC flights to split-charter flights.

44. Customer sign-ups and inquiries on Mainline's Hawaii TGCs, first advertised on August 12, 1973, declined after the publication of the ad.

45. Customer sign-ups and inquiries on the ITA/MSAA-sponsored TGCs, first advertised on September 2, 1973, increased after publication of the ad.

46. Requests from travel agents for blocks of seats on Mainline's Hawaii TGCs decreased significantly immediately following the mailing of the "Dear Partner in Travel" letter and the publication of the ad.

47. Western's anti-TGC campaign was the cause of the decrease in public interest in TGCs.

48. MSAA officials feared that the anti-TGC campaign of Western would have a negative effect on public interest in TGCs in 1974.

49. Western and MSAA officials met in MSAA's Bloomington headquarters on September 25, 1973. Western officials at the meeting were Lynn Zumbrunnen and Jon Meyers; MSAA officials present were Robert Rossman, Arthur Tomlinson, and Duane Edberg.

50. MSAA officials tried to point out the more blatant misstatements in the ad. Zumbrunnen, however, refused to discuss them. Zumbrunnen stated he was instructed by Balfour, his superior, not to discuss the ad with MSAA officials.

51. Zumbrunnen's statements and conduct forced MSAA to recognize its dependence on Western's continued preferential treatment of MSAA on Group 60 tariffs to Las

Vegas, Western being the only direct, non-stop carrier to Las Vegas. MSAA became aware that its continued promotion of TGCs would jeopardize its ability to market the Group 60 tariff with Western.

52. By reason of the statements and conduct of Western officers, MSAA officials felt it best to cooperate with Western and not to proceed with MSAA's planned TGC operations with ITA.

53. Shortly after the meeting, and as a direct result of it, MSAA announced that it was cancelling the Hawaii and Mexico TGCs planned with ITA.

54. MSAA based its decision on the decrease in public interest caused by Western's anti-TGC campaign and on the potential reduction of MSAA's preferred Group 60 space.

55. Shortly after MSAA cancelled its Hawaii and Mexico TGCs with ITA, MSAA cancelled its London TGCs planned with ITA for the same reasons.

56. Western's express purpose in publishing the west coast anti-TGC ads was to prevent TGCs from becoming a competitive threat to Western's regularly scheduled air service between west coast cities and Hawaii.

57. Although steps were taken by Western and BBD&O to republish the anti-TGC ad, plans to do so were terminated. Western felt that the campaign had been at least partly responsible for the indifferent success of Hawaii TGCs from west coast cities.

58. Western's purpose in embarking on its anti-TGC campaign in the Twin Cities and other Minnesota cities was to prevent the TGCs from becoming a competitive threat in this area.

59. Its purpose was not to merely inform the public or to speak out on a political issue. If such had been the case, a substantially misleading or deceptive campaign would have been unnecessary.

60. Western abandoned plans for revising and again publishing the Twin Cities ad after being informed that MSAA had cancelled its TGC plans with ITA.

61. Western was aware that the natural and probable consequence of its veiled threats to MSAA to reduce preferred allocation of Group 60 space was to induce MSAA to cancel the TGC plans it had with ITA.

62. Western's anti-TGC campaign was knowingly, intentionally, and purposefully designed to eliminate TGCs as a competitive force to Western's regularly scheduled air service, and Western was aware that such elimination of competition would be the natural and probable consequence of its conduct.

63. In the air transportation industry, a market consists of service between a pair of points. The Twin Cities/Hawaii air route fits that definition and is, therefore, a separate and identifiable market.

64. Western's market share of regularly scheduled single ticketed air service between the Twin Cities and Hawaii rose from 56.8 percent in 1970 to 68.6 percent in 1973.

65. The TGC, unlike the single entity charter, the affinity charter, or any other charter, could be advertised and sold to the general public. Unlike the inclusive tour charter and other charters marketed to individuals, the TGC did not require the individual to purchase a ground package, hotel, or anything other than air transportation. The TGC was sold through retail travel agents as was regularly scheduled service.

66. The only charter concept which constituted efficient competition to regularly scheduled air service between the Twin Cities and Hawaii was the TGCs. They did not compete until the first quarter of 1974.

67. Because Western was the only regularly scheduled air carrier having direct and non-stop flight service between the Twin Cities and Las Vegas, Western had a monopoly, albeit a regulated one, in that market.

68. MSAA and ITA committed themselves to plans to operate four TGCs to Hawaii in 1974. The four MSAA/

ITA TGCs to Hawaii had been advertised at the time Western published its ad in the Twin Cities papers. ITA could not market these TGCs without the assistance of MSAA.

69. Because of Western's conduct, MSAA cancelled these TGCs. Absent Western's conduct, these TGCs to Hawaii would likely have operated successfully.

70. Western's conduct caused ITA to lose profits on the four TGCs to Hawaii it had planned to run with MSAA, and its damages are not difficult to ascertain.

71. ITA's proposed agreement with MSAA (Ex. 31) establishes the terms pursuant to which ITA and MSAA would have divided profits on the Hawaii TGCs. Four DC-10s would have been flown to Hawaii with 345 passengers each, for a total of 1,380 passengers. Each passenger would have been charged a $43.42 service charge. Twenty percent of the total service charge would go to ITA. Thus, ITA's loss of profit on airfare amounted to $11,984 computed as follows:

1,380 passengers x $43.42 x 20 percent = $11,934.

72. ITA also lost profits on ground arrangements exclusive of optional tours. A fair estimate of the number of persons who would have bought ground arrangements on the 1974 TGCs may reasonably be based on the percentage of passengers purchasing ground arrangements on ITA's 1977 Hawaii TGCs. In 1977, 87 percent of the passengers ITA flew to Hawaii on its TGCs purchased ground arrangements. The same percentage applied to 1974 TGCs shows that 1,200 passengers would have purchased ground arrangements.

Four ground packages were available, yielding profit to ITA and MSAA of $27, $26, $35, and $30. The fairest estimate is that 96 passengers would have purchased the ground arrangements yielding a profit of $27; 444 passengers would have purchased the package yielding $26; 324 passengers would have purchased the package yielding $35; and 336 passengers would have purchased the package yielding $30. These figures are also reasonably based on

percentages actually experienced by ITA on its 1977 Hawaii TGCs. Pursuant to its agreement with MSAA, ITA was to receive 20 percent of the total profit on ground arrangements.

ITA's profit loss on ground arrangements, therefore, totals $7,111 computed as follows:

96 passengers	×	$27 profit	= $ 2,592
444 passengers	×	$26 profit	= $11,544
324 passengers	×	$35 profit	= $11,340
336 passengers	×	$30 profit	= $10,080
			$35,556

ITA Loss — $35,556 × 20 percent = $ 7,111

73. ITA lost further profits in lost optional tours. ITA's actual experience on its 1977 Hawaii TGCs provides the best available measure of the average purchase per passenger of optional tours. Based on the 1977 experience, the average per passenger purchase of optional tours is $58.76. ITA's commission was to be 15 percent of the average purchase per passenger on optional tours. The best estimate is that 1,200 passengers would have purchased optional tours. ITA would receive an average of $3.81 per passenger.

Any inflation factor tending to cause a difference between the 1974 purchase per passenger and the 1977 purchase per passenger is offset by the fact that more passengers were likely to purchase optional tours in 1974 than in 1977.

ITA was to take all of its commissions on the optional tours, and none of it was to be allocated to MSAA. ITA's loss on optional tours, therefore, is $10,572 computed as follows:

1,200 passengers × $3.81 = $10,572.

74. Western's conduct caused ITA to lose a total of $29,667 in profit on the four Hawaii TGCs it had negotiated to operate with MSAA.

75. ITA and MSAA had also firmly committed themselves to running four TGCs to Mexico in the first quarter

of 1974, and, in fact, they had begun advertising them prior to the time Western published its anti-TGC ad in the Twin Cities. Because of Western's conduct, MSAA cancelled these TGCs. ITA could not market these TGCs without MSAA's assistance.

76. Air travel of United States citizens to Mexico, at the time, was a rapidly expanding market. Due to the relatively low price of the TGCs as opposed to regularly scheduled service, and due to the expanding market, the ITA/MSAA Mexico TGCs were a highly saleable product. Had MSAA not cancelled, all four TGCs to Mexico would likely have operated successfully.

77. Western's conduct caused ITA to lose profits on the four Mexico TGCs it had planned to operate with MSAA, and ITA's damages are not difficult to ascertain.

78. Four flights carrying 223 passengers each would have been run, for a total of 892 passengers. Service charge per passenger was $54.85. Pursuant to the agreement with MSAA, ITA was to take 20 percent of the total service charges. ITA's loss on airfare is, therefore, $9,785 computed as follows:

892 passengers × $54.85 charge × 20 percent = $9,785.

79. Two ground packages exclusive of optional tours were also available, one yielding a total profit of $31 per passenger and the other yielding $44 per passenger. Due to the many similarities between Hawaii and Mexico as vacation spots, the 87 percent figure attributable to the Hawaii TGCs is equally applicable to the Mexico TGCs. The best estimate is, therefore, that 776 passengers, or 87 percent of the total passengers, would have purchased ground arrangements; that 388 passengers would have purchased the ground package yielding a profit of $31; and that 388 would have purchased the package yielding $44. ITA was to take 20 percent of the total profits on ground arrangements.

ITA's loss on ground arrangements, therefore, is $5,820 computed as follows:

388 passengers × $31 × 20 percent = $2,405
388 passengers × $44 × 20 percent = 3,414
Total loss $5,820

80. Due to similarities in Hawaii and Mexico as vacation spots, it is reasonable to assume that 87 percent of the total passengers to Mexico would have purchased optional tours as they had done in Hawaii. This amounts to 776 passengers. It is equally reasonable to assume a commission of $8.81 per passenger. ITA was entitled to all of the profits earned on optional tours. Thus, ITA's loss on optional tours is $6,837 computed as follows:

776 passengers × $8.81 = $6,837.

81. Western's conduct caused ITA to lose a total of $22,442 in profit on the four Mexico TGCs it planned to operate with MSAA.

82. At the time Western published its anti-TGC ad in the Twin Cities, MSAA planned to run 13 TGCs to London in 1974 with ITA. These 13 TGCs constituted a program distinct and independent from the TGCs to Europe that ITA planned to run and actually did run on its own in 1974.

83. Because of Western's conduct, MSAA cancelled these TGCs. Absent Western's conduct, all 13 TGCs to London would probably have operated successfully. ITA suffered a loss of profits and its damages are not difficult to ascertain.

84. Thirteen DC-10s, carrying 345 passengers each, would have flown to London, for a total of 4,485 passengers. A service charge of $64 would have been assessed per passenger. ITA would have taken 20 percent of the total service charges. Thus, ITA's lost airfare profits total $57,408 computed as follows:

4,485 passengers × $64 × 20 percent = $57,408

85. ITA lost profits on the London TGC ground arrangements as well. The best measure for determining the average gross profit per passenger on ground arrangements is ITA's actual experience on its 1974 European TGCs. On its 1974 European TGCs, the average gross profit per passenger on ground arrangements amounted to $12.28. This figure must be multiplied by the total passenger number of 4,485 to obtain total gross profits, since the number 4,485 was used in computing average profit to begin with. ITA would be entitled to 20 percent of the total profits derived from ground arrangements. ITA's loss on ground arrangements, therefore, is $11,015 computed as follows:

$$4{,}485 \text{ passengers} \times \$12.28 \times 20 \text{ percent} = \$11{,}015.$$

86. Western's conduct caused ITA to lose a total of $68,423 in profits on the London TGCs it planned to run with MSAA.

87. By agreement of the parties, the court has deferred the taking of testimony with regard to the matter of the award of attorney fees to a later date.

CONCLUSIONS OF LAW

1. The District Court has jurisdiction over this claim pursuant to Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

2. At all relevant times, both ITA and Western were engaged in interstate commerce.

3. Western's conduct more particularly described in the Findings of Fact, affected interstate commerce because it affected the movement of persons by air from Minnesota and surrounding states to Hawaii, Mexico, and Europe.

4. The reference to the Magistrate as a Special Master is pursuant to 28 United States Code, Section 636, Rule 54, Federal Rules of Civil Procedure, and the Orders and Stipulations on file herein.

5. BBD&O was at all times a separate legal entity capable of combining and conspiring with Western in violation of the Sherman Act.

6. BBD&O did in fact combine and conspire with Western in restraint of trade by knowingly and actively participating in a course of anticompetitive conduct.

7. Western's publication of the ad of September 16, 1973, was part of a course of conduct constituting an unreasonable restraint of trade. The ad was false, misleading, and deceptive. Publication of the ad was not protected by the First Amendment of the United States Constitution.

8. Western's distribution of the "Dear Partner in Travel" letter to travel agents in Minnesota was part of a course of conduct constituting an unreasonable restraint of trade.

9. Western's use of its market leverage over Group 60 seats on flights between the Twin Cities and Las Vegas to intimidate MSAA was part of a course of conduct constituting an unreasonable restraint of trade.

10. Western's course of conduct was deliberately and purposely designed to prevent the TGC, a lawfully enacted concept, from effectively competing with regularly scheduled air service, in direct contravention of an express policy of the United States government.

11. Western's course of conduct was in violation of Section 1 of the Sherman Act and caused damage to ITA.

12. That portion of interstate commerce consisting of individually-ticketed air transportation on the Twin Cities/Hawaii route is a distinct and identifiable submarket, the monopolization of which constitutes a violation of 15 U.S.C. Section 2. Western possessed monopoly power in this submarket.

13. Western also possessed monopoly power over a submarket of interstate commerce consisting of direct and non-stop air transportation between Las Vegas and the Twin Cities, and, specifically, the Group 60 Fare on the Twin Cities/Las Vegas route.

14. Western intentionally sought to maintain its monopoly power in the relevant market by publishing a false and misleading advertisement in the Minneapolis and St.

Paul newspapers on September 16, 1973, and by distributing to travel agents in Minnesota the "Dear Partner in Travel" letter, discouraging such travel agents from participating in TGCs and from selling TGCs to the public.

15. Western intentionally sought to maintain its monopoly power in the relevant market by improperly using its market position in the Twin Cities/Las Vegas route as leverage to intimidate MSAA.

16. Western deliberately, purposely and wrongfully maintained its monopoly power in the Twin Cities/Hawaii submarket by perpetrating a course of conduct designed to eliminate the competition of TGCs.

17. Western violated Section 2 of the Sherman Act by monopolizing that portion of interstate commerce consisting of individually ticketed air transportation on the Twin Cities/Hawaii route.

18. Western entered into the combination with BBD&O with the specific intent to monopolize that portion of interstate commerce consisting of individually ticketed air transportation on the Twin Cities/Hawaii route.

19. The acts specified in the Findings of Fact were done in furtherance of the combination to monopolize.

20. The aforementioned conduct would reasonably result in the monopolization of the relevant market sooner or later.

21. Western violated 15 U.S.C. Section 2 by attempting to monopolize, by means heretofore enumerated, that portion of interstate commerce consisting of individually ticketed air transportation on the Twin Cities/Hawaii route.

22. Western's course of conduct was in violation of Section 2 of the Sherman Act and caused damage to ITA.

23. Alleged advertising by ITA and alleged deception of the CAB by ITA are not issues in this case and cannot preclude ITA's recovery against Western for violations of the Sherman Act.

24. Western's violations were the proximate cause of ITA's loss of profits on TGCs it planned to operate with MSAA to Hawaii, Mexico, and London.

25. Violations of 15 U.S.C. Section 1 and 15 U.S.C. Section 2 by Western proximately caused damage to ITA in the amount of $120,532.

26. Pursuant to 15 U.S.C. Section 15, Plaintiff is entitled to recover treble damages in the amount of $361,596.

27. Pursuant to 15 U.S.C. Section 15, Plaintiff is entitled to recover its reasonable attorneys' fees in an amount to be determined after an evidentiary hearing is held.

RECOMMENDED ORDER FOR JUDGMENT

Based upon the foregoing findings of fact and conclusions of law, IT IS HEREBY RECOMMENDED that the District Court enter an order that:

1. Judgment be granted for Plaintiff ITA and against Defendant Western in the total amount of $361,596, together with interest from the date hereof; and

2. Plaintiff be awarded attorney fees in an amount to be determined by the undersigned following a hearing for that purpose to be held within 60 days following entry of judgment.

Dated: June 7, 1978.

ROBERT G. RENNER
United States Magistrate

All objections must be filed with the Clerk of Court, Minneapolis, MN, within 10 days of the filing of the Report of the Special Master.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

INTERNATIONAL TRAVEL ARRANGERS, a corporation, *Plaintiff,* *vs.* WESTERN AIRLINES, INC., *Defendant.*	MEMORANDUM Civil 4-74-256

Plaintiff, International Travel Arrangers (ITA), commenced this treble-damage action under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, for injuries sustained as a result of the defendant's, Western Air Lines (Western), anticompetitive course of conduct. Plaintiff alleges that in 1973, defendant combined with the advertising firm of Batten, Barton, Dirsten and Osborne (BBD&O) for the purpose of publishing deceptive advertising aimed at destroying travel group charter (TGC) competition from plaintiff and others, and creating and maintaining a monopoly for itself. Plaintiff also alleges that the defendant engaged in other overt actions, including threats, which, because of Western's monopoly power, had the intended effect of maintaining Western's monopoly power.

The defendant, aside from denying that its advertising was deceptive and that its conduct and intent were anticompetitive, asserts three defenses: (1) that its advertisement constitutes protected speech under the First Amendment of the United States Constitution, (2) that plaintiff's conduct was *in pari delicto* to that of the defendant, and (3) that plaintiff has failed to prove any resultant damages either in fact or in amount.

The Court's conclusion that the defendant's advertisement was deceptive and that its course of conduct had the intended anticompetitive effect is thoroughly elucidated in the Findings of Fact. Further discussion of this conclusion is, therefore, unnecessary. The Court instead will focus on the three defenses raised.

A. *First Amendment Protection*

The defendant first claims that the Noerr/Pennington doctrine, *Eastern Railroad Conference vs. Noerr Motor Freight,* 365 U.S. 127, 81 S.Ct. 523 (1961); *United Mine Workers vs. Pennington,* 381 U.S. 657, 95 S.Ct. 1585 (1965), combined with the line of First Amendment decisions from *New York Times vs. Sullivan,* 376 U.S. 254, 84 S.Ct. 710 (1964); to *Bigelow vs. Virginia,* 421 U.S. 809, 95 S.Ct. 2222 (1975); *Virginia Pharmacy Board vs. Virginia Consumer Council,* 425 U.S. 748, 96 S.Ct. 817 (1976); and *Bates vs. State Bar of Arizona,* ..... U.S. ....., 97 S.Ct. 2691 (1977), immunizes advertising *per se* from Sherman Act liability and that, in any event, the Sherman Act was not intended to reach advertising activity. This argument is not relevant to the facts in this case.

The Noerr/Pennington doctrine protects certain types of communications under the First Amendment right to petition from prosecution under the antitrust laws. As the Supreme Court stated in *Noerr*:

> "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in the representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of

petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above. For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." 365 U.S., at 137-138.

The defendant urges the Court to apply this rationale to immunize its advertisement in the instant case. However, there is no evidence that the defendant ever had any political purpose, within the meaning of *Noerr,* which could justify such an application. As the Court has found, the defendant's purpose in publishing the ad was to destroy competition from TGCs in whatever way possible, but primarily by trying to dissuade the public and the travel agencies from using them. All of the evidence indicates that this was defendant's *sole* reason for publishing the ad. Moreover, it used other means as well as the advertisement to attain that goal. Clearly, the alleged political purpose was but an afterthought.

Thus, the situation here is readily distinguishable from that in *Noerr.* As the Court there pointed out:

"There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, all of the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws. Circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents discuss in one way or another the railroads' charges that heavy trucks injure the roads, violate laws and create traffic hazards and urge that truckers should be forced to pay a fair share of the costs of rebuilding the roads, that they should be compelled to obey the laws, and that limits should be placed upon the weight of the loads they are

permitted to carry. In the light of this, the findings of the District Court that the railroads' campaign was intended to and did in fact injure the truckers in their relationships with the public and with their customers can mean no more than that the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action and that the railroads were hopeful that this might happen." 365 U.S., at 142.

Conversely, in light of this Court's finding that the defendant had no political purpose in publishing the advertisement, it is plain that the Noerr/Pennington doctrine has no applicability here.

It, therefore, becomes unnecessary to discuss the "sham exception" to the doctrine. Nevertheless, it is instructive to recapitulate the language used by the Supreme Court in developing the rationale for the exception. In *California Motor Transport Co. vs. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609 (1972), the sham exception was first utilized in upholding Sherman Act liability where the defendant's exercise of its right to petition was used to harass and effectively deny the plaintiffs their own right to put before the administrative agency an application which, if granted, would have put the plaintiffs in competition with the defendants. In rejecting the defendant's First Amendment plea, the Court stated:

"Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process .... Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'

"Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the anti-trust laws.

"It is well settled that First Amendment rights are not immunized from regulation when they are used as an

integral part of conduct which violates a valid statute. *Giboney vs. Empire Storage Co.*, 336 U.S. 400. In that case Missouri enacted a statute banning secondary boycotts and we sustained an injunction against picketing to enforce the boycott, saying:

> 'It is true that the agreements and course of conduct here were as in most instances brought about through speaking and writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed . . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.' 336 U.S., at 502"

404 U.S., at 513-514.

This language, in combination with the recent First Amendment cases relied upon by the defendant lead to a conclusion not that defendant's advertising is immune from Sherman Act liability, but, rather that it is well within the scope of the type of activity made actionable thereunder.

We must begin with the dual proposition that speech is protected even in the form of paid advertisement and that if commercial speech is to be distinguished, it must be distinguished by its content. *Bates vs. State Bar of Arizona, supra,* 97 S.Ct., at 2698-2699; citing *Virginia Pharmacy Board vs. Virginia Consumer Council, supra; Buckley vs. Valeo,* 424 U.S. 1, 96 S.Ct. 710 (1976). It cannot be distinguished by the fact that the speaker is a corporation as opposed to an individual. *First National Bank of Boston vs. Belloti,* ..... U.S. ....., ... S.Ct. ....., 36 U.S.L.W. 4371 (April 26, 1978).

However, the protection is not absolute. Even a public official may recover damages for publication of a defamatory falsehood upon a showing of "actual malice." *New*

York Times Co. vs. Sullivan, supra. Advertisement of a commercial activity which itself is illegal may be prohibited. *Pittsburgh Press Co. vs. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 93 S.Ct. 2553 (1973). Indeed, the lower courts have consistently held that there is no constitutional right to disseminate false or misleading advertisements. See, for example, *Federal Trade Commission vs. Simeon Management Corp.,* 532 F.2d 708 (9th Cir. 1976); *Federal Trade Commission vs. National Commission on Egg Nutrition,* 517 F.2d 485 (7th Cir. 1975); *L. G. Balfour Co. vs. Federal Trade Commission,* 442 F.2d 1 (7th Cir. 1971); *Murray Space Shoe Corp. vs. Federal Trade Commission,* 304 F.2d 270 (2nd Cir. 1963); *E. F. Drews & Co. vs. Federal Trade Commission,* 235 F.2d 735 (2nd Cir. 1956), *cert. denied,* 352 U.S. 969, 77 S.Ct. 360 (1957).

The recent First Amendment decisions of the Supreme Court concerning commercial speech do not contradict these holdings; rather, they are consistent with them. For example, in *Virginia Pharmacy Board vs. Virginia Consumer Council, supra,* in which a statutory ban on prescription drug price advertising was held unconstitutional, the Court was careful to distinguish commercial speech generally from deceptive advertising:

> "Nor is there any claim that prescription drug price advertisements are forbidden because they are false or misleading in any way. Untruthful speech, commercial or otherwise, has never been protected for its own sake. *Gertz vs. Robert Welch, Inc.,* 418 U.S. 323, 340 (1974); *Konigsberg vs. State Bar,* 366 U.S. 36, 49, and n. 10 (1961). Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem." 425 U.S., at 771.

In *Bates vs. State Bar of Arizona, supra,* the Court further clarified the distinction:

> *"Advertising that is false, deceptive, or misleading of course is subject to restraint.* See *Virginia Pharmacy Board vs. Virginia Citizens Council,* 425 U.S., at 771-772,

and n. 24, 96 S.Ct., at 1830-1831. Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech. *Id.*, at n. 24, 96 S.Ct., at 1830. And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena. Compare *Getrz vs. Robert Welch, Inc.*, 418 U.S. 323, 339-341, 94 S.Ct. 2997, 3006-3007, 41 L.Ed. 2d 789 (1974); and *Cantwell vs. Connecticut*, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940), with *NLRB vs. Gissel Packing Co.*, 395 U.S., at 618, 89 S.Ct., at 1942. * * *

"As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place and manner of advertising." 97 S.Ct., at 2708-2709. (Emphasis added.)

The defendant suggests that the *Bates* Court's approval of commercial speech restraints encompasses only speech concerning one's own product. Such a narrow interpretation of the Court's language is unwarranted. That Court specifically addressed the question in the terms it did because the case concerned only advertisement of services by lawyers. It did not condone disparagement of another product, nor did it condone false advertising with anti-competitive purpose. It simply did not specifically discuss them at all. This Court is unwilling to conclude, absent other facts, that there is a constitutionally significant distinction between advertisements of one's own product and those concerning products of another. In the absence of First Amendment protection, it cannot otherwise be found that false advertising may not form part of the basis of Sherman Act liability.

Insofar as the defendant argues that the Sherman Act does not prohibit false advertising, it misses the point.

The recent Supreme Court decision in *National Society of Professional Engineers vs. United States,* ..... U.S. ....., ... S.Ct. ....., 46 U.S.L.W. 4356 (April 25, 1978), is instructive in this regard. In that case, the Court held that the trial court had properly enjoined the Society's publication of standards which stated or implied that competitive bidding was unethical.

The defendant here argues that the standards in the *Society* case were but evidence of an underlying agreement, whereas here the ad itself is the alleged cause of liability. This is not the case, however; for just as the Society's ethical standards were but evidence underlying an anticompetitive agreement, so too is the ad at issue here merely evidence of an agreement in restraint of trade. In fact, the publication of the ad is but one of several overt acts committed by the defendant in furtherance of its anticompetitive scheme. In other words, the defendant here is not being held liable simply because it published a deceptive ad, but rather because it published the ad as part of its overall plan to destroy competition and to attempt to maintain and further develop its monopoly position.

The Sherman Act does not delineate the specific types of combinations that are illegal. Rather, it makes "every contract, combination . . . or conspiracy in restraint of trade" illegal, and it makes "every person" who monopolizes, attempts to monopolize, conspires to monopolize liable. 15 U.S.C. §§ 1 and 2. The defendant here entered into agreement to restrain trade and monopolize. That agreement called for the publication of the advertisement as a means of effecting its goal.

It is clear that the defendant's agreement with BBD&O to publish the deceptive advertisement is a combination properly giving rise to Sherman Act liability.

B. *Western's In Pari Delicto Defense*

The defendant next asserts that it should not be held liable for Sherman Act violations based upon the publication of its deceptive advertisement because plaintiff's own previous TGC advertisements were deceptive, illegal and

fraudulent in nature, and were closely related to the challenged conduct of Western.[1] This contention cannot survive scrutiny.

The United States Supreme Court's most recent pronouncement concerning the vitality of the *in pari delicto* type defenses is an apparent across-the-board preclusion of their application. *Perma Life Mufflers, Inc. vs. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981 (1968). Justice Black explained the reasons therefor as follows:

> "Although *in pari delicto* literally means 'of equal fault,' the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing. We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes. It was for this reason that we held in *Kiefer-Stewart Co. vs. Seagram & Sons*, 340 U.S. 211 (1951), that a plaintiff in an antitrust suit could not be barred from recovery by proof that he had engaged in an unrelated conspiracy to commit some other antitrust violation. Similarly, in *Simpson vs. Union Oil Co.*, 377 U.S. 13 (1964), we held that a dealer whose consignment agreement was cancelled for failure to adhere to a fixed resale price could bring suit under the antitrust laws even though by signing the agreement he had to that extent become a participant in the illegal, competition-destroying scheme. Both *Simpson* and *Kiefer-Stewart* were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the

---

1. The defense has been dubbed an *in pari delicto* defense, although it may be more akin to an "unclean hands" or contributory illegality defense. The distinction is noted here not because of its significance, but rather because it has been noted by other courts in discussions of the applicability of these similar defenses to antitrust actions. See, for example, *Memorex Corp. v. International Business Machines Corp.*, 555 F.2d 1379, 1382 (9th Cir. 1977).

reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct. *Kiefer-Stewart, supra.*

"In light of these considerations, we cannot accept the Court of Appeals' idea that courts have power to undermine the antitrust acts by denying recovery to injured parties merely because they have participated to the extent of utilizing illegal arrangements formulated and carried out by others . . . . We therefore hold that the doctrine of *in pari delicto,* with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action." 392 U.S., at 138-140.

With one exception, the *Perma Life* holding has been consistently followed by the Circuit Courts of Appeals. *See Lamp Liquors, Inc. vs. Adolph Coors Co.,* 563 F.2d 425, 431 (10th Cir. 1977); *Adolph Coors Co. vs. A & S Wholesalers, Inc.,* 561 F.2d 807, 815-816 (10th Cir. 1977); *Calnetics Corp. vs. Volkswagen of America, Inc.,* 532 F.2d 674, 638-639 (9th Cir.), *cert. denied,* 429 U.S. 940, 97 S.Ct. 355 (1976); *Green vs. General Foods,* 517 F.2d 635 (5th Cir. 1975); *Semke vs. Enid Auto Dealers Association,* 456 F.2d 1361, 1370-1371 (10th Cir. 1972).

The exception arises out of the *Perma Life* Court's refusal to decide whether "truly complete involvement and participation in a monopolistic scheme could ever be the basis, wholly apart from the idea of *in pari delicto,* for barring a plaintiff's [antitrust] cause of action." 392 U.S., at 140.

The exception has been fashioned by the Courts of Appeals with caution and has been narrowly drawn. In *Javelin Corp. vs. Uniroyal, Inc.,* 546 F.2d 276 (9th Cir.

1976), *cert. denied,* 431 U.S. 938, 97 S.Ct. 2651 (1977), for example, the Ninth Circuit considered at length the attempts of other courts to resolve the status of the defense. It concluded:

> "Such decisions seem to temper *Perma Life's* apparent abolition of the *in par delicto* defense. See ABA Antitrust Developments 298 (2d ed. 1975). We agree that under certain circumstances a plaintiff may be barred from recovery, but believe that the mandate of *Perma Life* and the policy behind it demand that such circumstances be rare, and limited to where a plaintiff participated in the formation of the conspiracy.
>
> ". . . A plaintiff is barred from recovery only when the illegal conspiracy would not have been formed but for the plaintiff's participation. To satisfy this test, the jury must necessarily find that the degree of participation of the plaintiff must be equal to that of any defendant and a substantial factor in the formation of the conspiracy." 546 F.2d, at 276.

See also Dreibus vs. Wilson, 529 F.2d 170 (9th Cir. 1975); *Green vs. General Foods, supra; South-East Coal Co. vs. Consolidation Coal Co.,* 434 F.2d 767 (6th Cir. 1970), *cert. denied,* 402 U.S. 983, 91 S.Ct. 1682 (1971); *Premier Electrical Construction Co. vs. Miller-Davis Co.,* 422 F.2d 1132 (7th Cir. 1970).

More recently, the same court, in *Memorex Corp. vs. International Business Machines Corp.,* 555 F.2d 1379 (9th Cir. 1977), rejected an *in pari delicto* type defense which was manifested by a claim, not unlike that asserted here, that the market position which suffered injury was obtained through illegal means. The asserted defense was based upon the alleged theft by Memorex of International Business Machines' (IBM) trade secrets. The court held that the plaintiff's illegal conduct was not a defense to the antitrust action and that IBM's proper course would have been to assert a counterclaim against Memorex for the alleged misappropriation. It further reminded, "We continue to side with the goal of vigorous enforcement of our antitrust laws." 555 F.2d, at 1383.

The fact that the *Perma Life* holding was but a plurality decision is not of help to the defendant here, for each of the concurring opinions was in large part but an elaboration of the point which the plurality refused to decide. Significantly, however, none of the concurring justices indicated any intention of going further in allowing the defense than did the Ninth Circuit Court of Appeals in *Javelin.*

ITA was not an instigator or even a participant in Western's antitrust conspiracy. The defendant does not contend otherwise. Indeed, Western's strongest assertion is that ITA provoked the conspiracy by engaging in conduct equally as reprehensible as the conduct of Western itself. This is not enough to constitute a valid defense to an antitrust action. Western's proper course of conduct would appear to have been the instigation of a separate lawsuit, the assertion of a counterclaim, the filing of a complaint with the Civil Aeronautics Board, or simply the publication of a truthful counter advertisement.

In any event, it is clear that the conduct of the plaintiff here does not fit within the narrow scope of the *Perma Life* exception. The *in pari delicto* defense, therefore, is unavailable to Western.

C. *Causation and Damages*

The defendant's final contention is that the plaintiff has failed to prove that it suffered any injury as a result of the alleged antitrust violations. The evidence shows, however, and this court has found, that Western's unlawful conduct did, indeed, cause significant ascertainable damages to ITA.

The defendant's unlawful course of conduct was manifested primarily by two actions: (1) the publication in conjunction with BBD&O of false, misleading, and deceptive advertisements concerning TGCs and (2) the issuance of veiled threats to the Minnesota State Automobile Association (MSAA) for the purpose of keeping MSAA from participating in the operation of TGCs with ITA. Underlying the effectiveness of Western's course of conduct was

its position of monopoly power in both the Twin Cities/Las Vegas and the Twin Cities/Hawaii air travel market.

The facts reveal that Western viewed the advent of TGCs with trepidation, for TGCs posed a significant competitive threat not only to its established monopoly positions, but also to its competitive positions in other markets. When a similar threat had presented itself in the form of TGCs from the west coast to Hawaii, it successfully executed an advertising campaign similar to the one in Minnesota in several cities in California.

As early as January of 1973, ITA commenced discussions with MSAA concerning the implementation of a greatly expanded TGC program in the Twin Cities. By April, Western's Minneapolis personnel had been instructed to closely monitor TGC activity in the Twin Cities. On April 25, 1973, Western's vice president for passenger sales wrote to Mainline Travel, a Minneapolis travel agency, to dissuade it from participating in TGCs. On August 14, Western's regional director for this area recommended that advertisements such as the west coast ad be published and that letters discouraging TGC participation be sent to travel agents as a response to the "serious competitive situation."

On September 16, 1973, the deceptive advertisement prepared by BBD&O was published by Western in various Minnesota newspapers. A copy of the ad was sent to various travel agents three days beforehand accompanied by a letter discouraging participation in TGCs.

Following the appearance of the ad, TGC requests fell off significantly for both Mainline Travel and Travel Center, two Twin Cities agencies participating in TGC programs. Although MSAA's TGC requests increased slightly, this may be attributable to a normal delay in response to ITA's advertisements of its TGC program. The overall effect of the ad and the letter, however, is clear: Travel Center was forced to promote group travel through companies and organizations as it had done before TGCs came into existence in order to fill the flights it had booked, in effect, converting its TGC flights to split-charter flights;

Mainline Travel experienced a significant decrease in requests from travel agents for blocks of seats on its TGCs; and MSAA officials feared that Western's anti-TGC campaign would have a negative impact on public interest in its TGCs.

To express their concern, MSAA officials called a meeting with Western representatives. The meeting took place on September 25, 1974. Pursuant to instructions of their superiors, however, Western's representatives refused to discuss the ad with MSAA officials. Instead, veiled threats were issued to the effect that MSAA's preferential treatment on Western's Group 60 flights would be jeopardized if it continued to participate with ITA in the operation of TGCs.

The combination of this threat and the fear of decreased public interest in TGCs caused by Western's ad prompted MSAA to cease its participation in the joint ITA/MSAA TGC program. ITA was unable to market TGCs without the assistance of MSAA; therefore, plans for their joint 1974 TGC program had to be cancelled.

For convenience of discussion, the TGC program may be divided into four categories: (1) the four charters to Mexico; (2) the agreed-upon four charters to Hawaii; (3) the contemplated additional four charters to Hawaii; and (4) the 13 charters to London. Plaintiff's damage claim is well supported by the evidence as to all of the charters except those of category (3).

The evidence reveals that the market for group charters generally was a rapidly expanding one. TGCs, because of their low cost and method of sale, were particularly well-suited to capitalize on this expansion, both as to the sophisticated traveller and as to the first-timer.

As to categories (1) and (2) of the TGC program, there is every indication that they would have operated successfully. The commitment of the parties to these TGCs was firm, advertising had already gone out, and responses had already been received. Furthermore, ITA's success with TGCs in subsequent years is impressive. For example, in

1975, ITA sponsored five successful TGCs to Hawaii. It successfully sponsored 12 in 1976, and 26 in 1977.

As to the four Hawaii TGCs in category (3), however, success appears doubtful. No commitment was ever made to implement plans for their operation, and such plans were not to be implemented unless the success of the first four Hawaii TGCs appeared imminent. In light of the early stage at which MSAA's cancellation of their participation in the program occurred, such a determination was never made. The fact that only five TGCs to Hawaii operated in 1975 provides further evidence to support a conclusion that the operation of more than four Hawaii TGCs would not have been successful in 1974.

As to the TGCs in category (4), the London flights, the evidence is sufficient to convince the Court that their operation would have been successful. While plans for the London TGCs had not been firmed up at the time MSAA cancelled, this was not because of the parties' lack of interest but rather because of their preoccupation with the Mexico and Hawaii TGCs. This preoccupation is understandable in view of the fact that the Mexico and Hawaii TGCs were scheduled for the winter of 1974, while the London TGCs were not to depart until the following summer.

According to the plans, 13 London TGCs were to be jointly operated by ITA and MSAA in the summer of 1974. ITA was also planning to offer 12 TGCs on its own. MSAA's withdrawal caused the cancellation of the 13 joint TGCs. However, all of the 12 solo operations of ITA were successful, although alterations were made in the program as a result of the cancellation of the 13 joint flights. Furthermore, ITA's TGC experience in the summer of 1973 was so successful that, while only three had originally been planned, the response was so favorable that four additional TGCs were successfully operated. Thus, it must be concluded that all 13 of the ITA/MSAA sponsored TGCs to London would have operated successfully.

While the precise amount of the profit ITA would have gained as a result of the successful operation of its TGC

program cannot be measured, the law does not require such a high degree of precision. As the United States Supreme Court has said time and again,

> "Although the fact finder is not entitled to base a judgment on speculation or guesswork,
>
> > 'the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances, "juries are allowed to act on probable and inferential as well as direct and positive proof." *Story Parchment Co. vs. Paterson Parchment Paper Co.,* [282 U.S. 555, 561-564, 51 S.Ct. 248, 250-251 (1931)]; *Eastman Kodak Co. vs. Southern Photo Material Co.,* [273 U.S. 359, 377-379, 47 S.Ct. 400, 404-405 (1927)]. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery. [*Bigelow vs. RKO Radio Pictures, Inc.,* 327 U.S. 251, 264-265, 66 S.Ct. 574, 580 (1946)].'
>
> *Zenith Radio Corp. vs. Hazeltine Research, Inc.,* 395 U.S. 100, 124, 89 S.Ct. 1562, 1577 (1969).

Thus, where the illegal conduct of the defendant has resulted in the plaintiff's inability to prove damages with the exactness which would have been possible under freely competitive conditions, the defendant will not be heard to complain about the vagaries of the damage proof. *Heat-transfer Corp. vs. Volkswagenwerk, A.G.,* 553 F.2d 964 (5th Cir. 1977); *Agrashell, Inc. vs. Hammond Products Co.,* 479 F.2d 269 (8th Cir. 1973).

Plaintiff's damage estimate, which has been adopted by the court and fully set forth in the Findings of Fact, has substantial basis in the factual record of operation of plaintiff's own TGCs in other time periods, as well as the proposed agreement between ITA and MSAA. It is un-

necessary to further expound here on the intricacies of the measurement, except to note that a more precise estimate of damages is not within the realm of possibility. Nor is it required by law.

This court is convinced that MSAA cancelled its participation in its joint TGC program with ITA as a direct result of the defendant's unlawful conduct. The court is further convinced that, had MSAA not cancelled, all of the planned London and Mexico TGCs and four of the Hawaii TGCs would have operated successfully. Finally, the court is satisfied that plaintiff has adequately proven damages in the amount of $120,532.

Conclusion

The defendant's anticompetitive conduct was not protected by the First Amendment, nor does the asserted *in pari delicto* defense serve as a bar to plaintiff's recovery. Plaintiff has offered convincing proof of activity by the defendant violative of both Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and of the damages it has sustained as a result thereof. Plaintiff, therefore, is entitled to recover treble damages in the amount of $361,596.

Dated: June 7, 1978.

ROBERT G. RENNER
United States Magistrate

Supreme Court, U. S.
FILED
NOV 18 1980
MICHAEL RODAK, JR., CLERK

No. 80-668

IN THE

Supreme Court of the United States

October Term, 1980

WESTERN AIR LINES, INC.,

Petitioner,

vs.

INTERNATIONAL TRAVEL ARRANGERS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did Western Air Lines, Inc. unlawfully exercise its monopoly power and thereby violate Section 1 and/or Section 2 of the Sherman Act when it forced a competitor from the market place?

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No. 80-668

IN THE

Supreme Court of the United States

October Term, 1980

WESTERN AIR LINES, INC.,

Petitioner,

VS.

INTERNATIONAL TRAVEL ARRANGERS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, International Travel Arrangers, Inc., respectfully requests that this Court deny the Petition for review of the opinion of the United States Court of Appeals for the Eighth Circuit entered on June 10, 1980.

STATEMENT OF THE CASE

This case is about the exercise of monopoly power to thwart competition. It is not about the technical requirements of the TGC regulations; nor is it about advertising *qua* advertising, false, misleading, deceptive or otherwise. The Court of Appeals, in affirming, held that Western violated Sections 1 and 2 of the Sherman Act. In so doing, each of Western's legal and factual contentions was addressed and resolved in favor of the judgment. The Court of Appeals reviewed the record beyond the issues raised by Western; *sua sponte*, it examined whether the anti-TGC campaign violated Section 1. (623 F.2d at 1267) Issues deemed so unimportant by Western in the Court of Appeals, are now the focus of the Petition for *certiorari*.

FACTS OF THE CASE

1. The TGC.

Charter air transportation has long been authorized and regulated by the Civil Aeronautics Board ("CAB"). Prior to September, 1972, the most popular charter concepts contained restrictions which made those concepts non-competitive with single ticket, regularly scheduled service. (Findings 1b-d, 65-66, App. 2d, 13d.)[1]

The CAB, in September 1972, authorized the first true public charter, the Travel Group Charter ("TGC"), 14 C.F.R. §372a. *et seq*. The TGC allowed point-to-point transportation, could be advertised to the general public, and was sold on an individually ticketed basis with a definite departure and return. The regulations set forth detailed conditions which all TGC organizers were obligated to observe. (Findings 1a, 65; App. 2d, 13d.)

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[1] References to "App." are to Petitioner's Appendix.

The TGC was adopted to satisfy the "irresistible and understandable public demand for low cost air transportation." (CAB order adopting 14 C.F.R. §372a.; Finding 1a, App. 2d) The TGC combined the full-plane economies of charters and the single-ticket service sold directly to the public of regularly scheduled service. For the first time a charter organizer could organize a program incorporating back-to-back flights, (i.e., deliver one group, pick-up the previous group, etc.) introducing further economies of volume buying and the elimination of ferry legs.

Just as importantly, the TGC allowed entreprenurial freedom in pricing and packaging. Id. §372a.10. (See, Findings 70-85; App. 14d-18d which illustrate the mechanics.)

Within days of adoption of the regulations, International Travel Arrangers ("ITA") and a co-organizer, the Minnesota State Automobile Association, ("MSAA"), a large travel agent operating statewide in Minnesota, jointly organized a TGC pattern of three flights to London for departure in spring and early summer, 1973. Due to public demand for tickets and availability of aircraft, the program was enlarged to seven flights. The success in selling this program led ITA and MSAA to immediately plan for a greatly expanded program for 1974. (Finding 57, App. 4c-d.)

2. Western and Its Market Power.

Western Air Lines, Inc. ("Western"), as is here relevant, services Hawaii and Las Vegas from the Twin Cities. Western is the only carrier to provide regularly scheduled nonstop and direct service[2] between the Twin Cities and Las Vegas, Nevada. (Findings 1b, 28; App. 3d-9d.)

The airline industry defines a market as any two city pairs, i.e., Twin Cities/Hawaii or Twin Cities/Las Vegas, a

[2] Direct service is single plane service with intermediate stops.

definition Western does not contest. The Twin Cities/Hawaii market is dominated by Western. Western's share of that market grew from 56.8% in 1970 to 68.6% in 1973. Western controlled virtually 100% of the traffic on the Twin Cities/Las Vegas route. (Findings 63-64, 67; App. 13d.)

Western exploited its Twin Cities/Las Vegas monopoly in a way which gave it enormous leverage in dealing with travel agents. (Findings 28-40; App. 9d-10.) In 1970, in response to affinity charter activity, Western adopted a promotional "Group 60" fare on that route. A travel agent favored by Western could reserve 60 or more seats (usually more, to protect against cancellations). Air transportation was combined with Las Vegas accommodations by the travel agent who made both a commission on the transportation and a mark-up on the accommodations. The package price was not much greater than the single seat regularly scheduled air fare. The result was an object lesson in the law of demand; the low-priced packages greatly increased demand.

Western, however, was ill-equipped to take full advantage of the bonanza. Because it was aircraft-short it could not accommodate the demand for blocks of seats from all requesting travel agents. Thus, Western allocated space. By 1972 Mainline Travel and MSAA emerged as the most preferred. The District Court found that:

> "40. The supply imbalance gave Western the market power leverage to impose its wishes on those travel agents already favored or looking to become favored."

Early-on, Western perceived that the TGC would be effective competition for its regularly scheduled service. The Petition admits that Western could not compete pricewise. Equally important, Western was aircraft-short and thus could not charter aircraft to TGC organizers. (Finding 8; App. 9d.)

3. Western's Illegal Use of Its Market Power.

Western's first head-to-head encounter with TGC competition occurred in its West Coast cities/Hawaii markets. With active and expert collaboration of its advertising agency, Batton, Barton, Durstine & Osborne (BBD&O) Western initiated the anti-TGC campaign. (Findings 9-14; App. 4d-5d.)

Western knew that TGC competition would be stiffer in the Twin Cities than it had been on the West Coast (Finding 18; App. 5d-6d) and, thus, closely monitored TGC activity in the Twin Cities. It voiced its displeasure to both Mainline and MSAA executives. Early in the planning stages of the ITA/MSAA 1974 program, MSAA executives discussed among themselves the possibility that Western would punish MSAA by reducing or eliminating its preferred "Group 60" status. (Findings 15-16, 41-42; App. 5d, 10d.)

In June 1973, ITA and MSAA agreed on a 1974 TGC program to Hawaii, Mexico and London. In September ITA/MSAA commenced advertising Hawaii and Mexico TGCs for March and April, 1974 departure. London was agreed upon, but promotion would come later because of the later departure dates. (Finding 7; App. 4d, 15c.)

By August 1973, Western realized that TGC competition in the Twin Cities was effective. Twin Cities personnel advised higher-ups that "the travel agent industry is looking to Western Airlines for a reaction," and recommended a Minnesota anti-TGC campaign. (Finding 7, 19; App. 5d-6d.)

4. Exclusionary Effect and Injury to Competition.

The anti-TGC campaign was clearly exclusionary. The campaign influenced travel agents to refuse to sell TGCs; and, by false, misleading, and deceptive advertising it created a negative public reaction to the TGC.

Western was virtually assured that the anti-TGC campaign would work. Travel agents would support the campaign. After all, Western had an "inclination" that travel agents expected Western to so react; certainly, travel agents seeking "Group 60" seats would respond favorably. Western also knew that its West Coast efforts to stifle TGC competition had successfully created a negative attitude about TGCs in the mind of the consumer. (Finding 14, App. 5d.) The same negative attitude could be expected in Minnesota.

MSAA executives believed the anti-TGC campaign would doom the ITA/MSAA program. (Finding 48; App. 11d.) At a meeting sought by MSAA, Western threatened MSAA with elimination of preferential treatment in allocation of Group 60 seats unless MSAA ended its TGC activities. (Findings 49-55; App. 11d-12d.) Shortly thereafter MSAA cancelled the Hawaii TGCs, the Mexico TGCs, and finally, the London TGCs. (Findings 53-55; App. 12d.)

The District Court made detailed findings on causation and damages which were adopted by the Court of Appeals. (Findings 43-47, 52-54, 69; App. 11d, 12d, 14d, 12e.) 627 F.2d at 1271. The findings on causation demonstrate injury to competition caused by Western's conduct, and were so relied on by the Court of Appeals. 623 F.2d at 1268, 1271-1272. (See discussion at pp. 8-10, 13-15 *infra*.)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1) The resolution of Western's Question 3[3] in favor of the judgment moots Western's Questions 1 and 2. Question 3 asks this Court to re-weigh the record and overturn the Findings of the District Court, affirmed by the Court of Appeals, that Western used the market power of its Twin Cities/Las Vegas route to force ITA/MSAA out of the TGC business.

Should this Court properly refuse that invitation, Western argues that its violation of Section 2 by use of that market power (that is, ignoring, in Western's construct, the exclusionary effect of the anti-TGC campaign) does not support the entire damage award. That argument is factually unsupportable. Furthermore it ignores the principle often repeated by this Court, that the wrongdoer must bear the burden of uncertainty of amount of damages where the wrongful conduct causes uncertainty.

2) The anti-TGC campaign was used to willfully maintain Western's monopoly in the Twin Cities/Hawaii market. Section 2 proscribes exclusionary conduct by a monopolist. Such conduct need not be a separate violation of Section 1. The judgment is correct because the anti-TGC campaign and the threat, considered separately and together, illegally maintained Western's monopoly power. This analysis renders moot Western's Questions 1 and 2.

3) Nonetheless, the decision of the Court of Appeals is correct in holding the anti-TGC campaign to be a violation of Section 1 and that BBD&O was a co-conspirator.

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[3] "3. Whether there was a total failure of appellate review of the sufficiency of evidence on the issue of market leverage?"

I. THE JUDGMENT IS CORRECT AND SUPPORTABLE ON THE ISSUE THAT WESTERN'S USE OF THE MONOPOLY POWER OF ITS LAS VEGAS ROUTE TO EXCLUDE COMPETITION WAS PROVEN: AS A MATTER OF LAW THAT CONDUCT VIOLATED SECTION 2.

A. Western's Illegal Use of Leverage Was Proven.

The findings of the District Court show the enormity of Western's monopoly power from the Las Vegas route and its manipulation of travel agents through that power. The District Court found, and the Court of Appeals agreed that Western used that power to drive ITA/MSAA from the TGC market:

> ". . . The evidence includes the fact that the power of leverage by Western was established; that there was evidence presented from which the Special Master may have concluded that such leverage had been used in the past; that it was established that MSAA had an 'awareness' of the leverage and power that Western possessed; that Zumbrunen's testimony [Western's Regional headman] revealed that the subject of the Group 60 Fare seats and Western's Hawaii market were both discussed at the meeting; [and that thereafter, the ITA/MSAA TGCs program for 1974 was cancelled]." 623 F.2d at 1269-1270.

The Petition, pp. 27-28, argues a complete failure of appellate review on this factual issue. The above quote, to the contrary, shows painstaking review of the record.[4] Just as importantly, the Court correctly recognized the proper scope of its appellate function,[5] which the Petition ignores.

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[4] "We are satisfied that there is sufficient evidence to support the Special Master's findings." 623 F.2d at 1269.

[5] "It is not our function to try this case de novo, to pass upon credibility of witnesses or to determine the weight to be given to any particular testimony." 623 F.2d at 1270.

B. Violation of §2; Injury and Damages.

Western's attack[6] on the Court of Appeals ignores the plain language of the opinion. The Court of Appeals found that the use of leverage violated Section 2. 623 F.2d at 1270. The Court also held that the anti-TGC campaign contributed to the illegal maintenance of monopoly power, and, thus, also violated Section 2.[7] Blatant misstatement should not be the "stuff" on which the jurisdiction of this Court is sought.

The Court of Appeals correctly held that the use of Las Vegas route leverage to remove ITA/MSAA from the market violated Section 2 as a matter of law. *Accord: Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275-276 (2nd Cir. 1979). Indeed, Western does not challenge this proposition.[8]

Withdrawal by MSAA ended the 1974 program. ITA was dependent on MSAA financing and administering the program. (Finding 7.) This reality is reflected in the profit split; 80% was to go to MSAA. Moreover, the Special Master, in the Memoranda which accompanied the findings, said:

> "ITA was unable to market TGCs without the assistance of MSAA; therefore, plans for their joint 1974 TGC program had to be cancelled." (App. 14e.)

Any doubt that the illegal use of the Las Vegas route market power caused MSAA's withdrawal must be resolved against Western.[9] This Court, in *Bigelow v. RKO Radio*

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[6] Petition, pp. 27-28.

[7] The Court of Appeals was obviously pointing out that not every violation of Section 1 by a monopolist results in willful maintenance of monopoly power, and thus, a violation of Section 2. For instance, a monopolist who conspires with its chain of distribution to fix resale prices at a high level will leave room for a new entrant who can charge a lower price. Thus, the *per se* Section 1 violation may actually encourage entry.

[8] "If the judgment could be supported by this holding alone, *certiorari* might not be appropriate." Petition, p. 27.

[9] Again, Western's construct, Petition, pp. 27-28, totally ignores the anti-TGC campaign.

Pictures, Inc., 327 U.S. 251 (1946) and in its progeny,[10] has firmly adhered to the principle that:

> "The most elementary conception of justice and public policy requires that the wrongdoer shall bear the risk of uncertainty which his own wrong has created." 327 U.S. at 265.

Thus, the judgment is correct. There is no need to examine any other issue.

II. THE ANTI-TGC CAMPAIGN WAS EXCLUSIONARY IN PURPOSE AND EFFECT AND THUS AN UNLAWFUL EXERCISE OF MONOPOLY POWER.

A. Applicable Antitrust Principles.

It is a fundamental principle of antitrust law that acts to accomplish the unlawful ends of unreasonable restraint of trade or monopolization need not be unlawful. This Court has so stated often and emphatically. E.g., "If the end result is unlawful, it matters not that the means used in violation may be lawful." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972); ". . . [I]t is well settled that acts which are in themselves legal lose that legal character when they become elements of an unlawful scheme." *Continental Ore Co. v. Union Carbide & Carbon Corp., supra*, at 707. *Accord: American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). A monopolist who has lawfully acquired monopoly power "is tolerated but not cherished."[11] Thus any exclusionary conduct by one possessing monopoly power is proscribed by the antitrust laws.

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[10] E.g. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

[11] *Berkey Photo, Inc., supra*, at 274.

> "In sum, although the principles announced by the §2 cases often appear to conflict, this much is clear. The mere possession of monopoly power does not *ipso facto* condemn a market participant. But, to avoid the proscriptions of §2, the firm must refrain at all times from conduct directed at smothering competition. This doctrine has two branches. Unlawfully acquired power remains anathema even when kept dormant. And it is no less true that a firm with a legitimately achieved monopoly may not wield the resulting power to tighten its hold on the market." *Berkey Photo, Inc., supra,* at 275.

Accord: Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir. 1980); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.,* 627 F.2d 919 (9th Cir. 1980).

The Court of Appeals correctly held the anti-TGC campaign a violation of Section 1. Section 2, however, only requires that the anti-TGC campaign be significantly exclusionary. The conclusion that the anti-TGC campaign willfully maintained Western's monopoly power satisfies Section 2 requirements.[12] 623 F.2d at 1270.

B. The Anti-TGC Campaign.

The Court of Appeals recognized that the anti-TGC campaign was not constitutionally protected. 623 F.2d at 1267, n. 14. ". . . [I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced,

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[12] The Court's Section 2 holding cites both the anti-TGC campaign and the use of leverage on MSAA as violating Section 2. See, *supra,* pp. 8-10, where the leverage issue is fully discussed.

or carried out by means of language, either spoken, written or printed." *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 502 (1949), cited with approval in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) and *California Motor Transport Co. v. Trucking Unlimited, supra.*

Nor is it a novel proposition that the written and spoken word can be used to exclude competition, thus violating the antitrust laws. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). If a publicity campaign, ostensibly directed at the government, is a mere subterfuge to interfere with a competitor's business, the antitrust laws are operative:

> "There may be situations in which a *publicity campaign*, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified . . ." 365 U.S. at 144. [emphasis added]

Accord: California Transport Motor Co. v. Trucking Unlimited, supra.

The anti-TGC campaign was admittedly aimed at the travel agents and the buying public. 623 F.2d at 1268. The campaign successfully interfered with competitors' access to the market place.

In *F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568, 579 (1966), and *American Tobacco Co. v. United States, supra*, at 797 this Court recognized that advertising can have anti-competitive and exclusionary effects which are reached by the antitrust laws. See also, *Purex Corp. v. Procter & Gamble Co.*, 596 F.2d 881, 887 (9th Cir. 1979). Recently, *Hunt-Wesson*

Foods, Inc. v. Ragu Foods, Inc., supra, clearly articulated the reason:

> ". . . [T]he question presented is whether any market could exist consistent with the allegations of Hunt's complaint, in which Ragu's non-price related activities could have contributed to an anticompetitive effect. Assuming the existence of some market power, Ragu's conduct could have made Hunt's entry into the market more difficult and costly, to the detriment of competition generally." 627 F.2d at 927.

C. Exclusionary Effects of the Anti-TGC Campaign: Injury to Competition.

The anti-TGC campaign was significantly exclusionary, and, thus injurious to competition on two levels. First, Western's conduct blocked access to travel agents; second, it created a negative reaction to TGCs in the mind of the public.

The District Court found that Western's Las Vegas route gave it leverage "on those travel agents favored *or looking to become favored.*" (Finding 40.) Western announced the anti-TGC campaign to the travel agents with the "Dear Partner in Travel" letter, enclosing a copy of the ad. 623 F.2d at 1261. This effectively closed the travel agents' door to TGCs.

Mainline, one of the other companies in the market, had been successful "wholesaling" blocks of seats to smaller travel agents. The "Dear Partner in Travel" letter and the ad ended that. (Finding 56.)

This vividly documents the coercive effect Western's conduct had on the travel agents. Western's control of the Twin Cities/Las Vegas route gave it power to bestow favors on

travel agents who cooperated. Western's conduct created a barrier to entry to travel agents for the TGC operators.[13]

Secondly, the ad negatively affected the consumer, (Findings 43-45. 623 F.2d at 1271)[14] in effect, creating a consumer boycott of the TGC.

The Court of Appeals was primarily concerned with the anticompetitive effect of Western's conduct. It did, however, examine the purpose and intent behind the anti-TGC campaign, and properly so.

Western's admitted intent[15] to stop competition from TGCs is important for a number of reasons. That intent reflects the successful anti-TGC campaign on the West Coast, and, thus, sheds light on the effect it had in Minnesota. Intent also explains any ambiguity of conduct. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n. 13; *Berkey Photo, Inc., supra,* at 288. Anti-competitive intent identifies purpose and, thus, negatives any claim to legitimacy of that purpose in terms of antitrust objectives. The Court of Ap-

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[13] The Petition at page 5 describes travel agents as "the independent distributors of the travel industry." This description highlights just how important the travel agents were to TGCs.

[14] Western's heavy reliance (Petition, pp. 21-22) on the discussion in *Berkey Photo, Inc., supra,* p. 288, n.41 is misplaced. First, the anti-TGC campaign had a demonstrated *substantial* adverse effect on competition. Second, the campaign disparaged competition rather than bathing Western's product in its best light. Third, Kodak's puffing created no barriers to entry; Western's anti-TGC campaign did. Fourth, Kodak was introducing a new innovative product; Western sought to protect itself from effective price competition from a new and innovative product, i.e. TGCs.

Furthermore, Western can not excuse its conduct by assailing ITA/MSAA advertising. (Petition, p. 20 n.7.) The District Court specifically refused to rule ITA's advertising in anyway deficient. (Conclusion of Law 23, App. 20d). The TGC was new; the ITA/MSAA combine without any market power. That the TGC was "bathed in the best light possible" was pro-competitive; that created no barriers to entry. *Berkey Photo, Inc., supra,* at 287.

[15] "58. Western's purpose in embarking on its anti-TGC campaign in the Twin Cities and other Minnesota cities was to prevent the TGC's from becoming a competitive threat in this area." (App. 12d).

peals, thus, properly examined Western's intent in terms of antitrust objectives. Western's admitted anti-competitive intent belies the argument of the Petition that the anti-TGC campaign was pro-competitive. Nothing in the record supports Western's *ipsi dixit* statement that because advertising is a means of competition, the anti-TGC campaign was therefore pro-competitive.

The Petition ignores the manifest exclusionary effect of the anti-TGC campaign. Even characterization of the anti-TGC campaign as "garden variety" unfair competition is unnecessary. Exclusionary conduct need not amount to a business tort. *Associated Radio Service Co. v. Page Airways Co., supra,* at 1353, 1356 n. 23. The touchstone is demonstrated exclusionary effect;[16] that the record here shows such effect is beyond question. 623 F.2d at 1272.

The decision of the Court of Appeals will have no inhibiting effect on the use of advertising as a means of competition. Advertising and publicity campaigns such as the anti-TGC campaign have met the antitrust laws before, without any noticeable chilling effect on advertising.[17]

The Court of Appeals aptly termed the anti-TGC campaign "a full frontal attack." It manifestly contravened "Sherman Act values"[18] in its anti-competitive, exclusionary effect.

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[16] The law's nexus is a "touchstone." The proof of exclusionary effect in this case is a "millstone" around Western's neck.

[17] See cases cited at pp. 13-14, *supra.* Neither have these cases led to a deluge of antitrust litigation.

[18] *Associated Radio Service Co. v. Page Airways, Inc., supra,* at 1351.

III. THE ANTI-TGC CAMPAIGN VIOLATED SECTION 1; BBD&O WAS PROPERLY HELD TO BE A CO-CONSPIRATOR.

A. Section 1.

Since this Court's decision in *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the rule of reason has been examined many times in the context of competitor cases. The cases are in accord that the relevant issues are definition of the market, the competitive mix in the market, the nature of the illegal conduct and the intent of the defendant, and whether competition has been injured. Recent cases which explore this analysis include *Associated Radio Service Co. v. Page Airways, Inc., supra*; *Franklin Music Co. v. American Broadcasting Companies*, 616 F.2d 528 (3d Cir. 1979); and *Northwest Power Products, Inc. v. Omark Industries*, 576 F.2d 83 (5th Cir. 1978).

The Petition presents no questions as to definition of the markets and competitive mix in those markets. The Petition challenges the assessment of the several courts below that the anti-TGC campaign was significantly exclusionary and injured competition.[19]

Furthermore the Petition fragments the anti-TGC campaign, trying to justify each aspect. Western's scheme must be viewed in its entirety and ITA given ". . . the full benefit of [its] proof without tightly compartmentalizing the various

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[19] Why so much of the Petition is devoted to trying to demonstrate the truthfulness of the September 16th ad is not readily answerable. The Findings relating thereto were properly affirmed. As the Special Master found:

> "59. Its [Western's] purpose was not to merely inform the public or speak out on a political issue. If such had been the case, a substantially misleading or deceptive campaign would have been unnecessary." (App. 12d).

factual components and wiping the slate clean after scrutiny of each . . ." *Continental Ore Co., supra,* at 699. The Court of Appeals obviously followed that admonition.

That the anti-TGC campaign was exclusionary is discussed, *supra,* at pp. 5-6, 14-15. Injury to competition was shown in that every TGC operator felt the sting of the anti-TGC campaign and ITA/MSAA was driven from the market altogether. The public was injured by being deprived of a lower priced alternative to regularly scheduled service. This, indeed, is profound injury to competition.[20]

B. BBD&O.

In *United States v. General Motors Corp.,* 384 U.S. 127 (1966), this Court said one conspires to violate the antitrust laws when one participates in "joint and collaborative action . . . pervasive in the initiation, execution and fulfillment of the plan." *Id.,* at 142-143. The Findings show such action and the Court of Appeals correctly affirmed. The discussion of this issue by the Court of Appeals is complete; there is no reason to lengthen this brief by reproducing that discussion.

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[20] *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.,* 429 U.S. 477 (1977) is inapposite. The exclusionary conduct, found illegal, caused injury. The amount is for the trier of fact. Furthermore, the argument at p. 23 of the Petition ignores this Court's injunction that plaintiff's case not be fragmented. *Continental Ore Co., supra* at 699.

CONCLUSION

For the foregoing reasons the Petition should be denied.

Respectfully submitted,

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FILED
NOV 24 1980
MICHAEL RODAK, JR., CLERK

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PETITIONER'S REPLY BRIEF

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

As shown in the Petition, the Eighth Circuit held that Western Air Lines, Inc. ("Western") violated the Sherman Act merely because its comparative advertising campaign against a new form of air travel competition was intended to be successful and was, in fact, successful. This holding perverts the Sherman Act by paralyzing competition and conflicts with all of the decisions rejecting such misuse of the antitrust laws. *See, e.g.,* cases cited at p.4 *infra.* International Travel Arrangers, Inc. ("ITA"), in its Brief In Opposition, is unable to cite any precedent for the decision below or defend the merits of the opinion. Instead, ITA devotes virtually all of its Brief to arguing (1) that the district court properly found that Western had used market leverage in the Minneapolis-Las Vegas market to discourage one travel agent from promoting Travel Group Charters ("TGC's") and (2) that Western's large share of the Minneapolis-Hawaii market somehow justifies the Eighth Cir-

cuit's novel decision.[1] As explained in the Petition at pp. 27-29, the first contention is both factually unsupportable and, more importantly, irrelevant to the question of whether certiorari is warranted. The second argument is simply incorrect legally.

I. THE DISTRICT COURT'S MARKET LEVERAGE HOLDING DOES NOT BY ITSELF SUPPORT THE JUDGMENT AND THUS DOES NOT MOOT THE PETITION.

The district court's market leverage holding does not by itself support the decision below. *See,* Petition, pp. 27-28. Although ITA spends several pages attempting to defend the district court's holding, ITA is unable to rebut the fact that the leverage holding, even if supportable, cannot by itself support the damages awarded against Western nor moot the major questions presented by the Petition.[2]

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1. ITA also implies in passing that Western did not raise the issue before the Court of Appeals of whether the "anti-TGC campaign" could constitute a violation of § 1 of the Sherman Act. Brief In Opp'n, p. 2. This was Western's "threshhold" argument, however, before the Court of Appeals. Brief of Appellant Western Air Lines, Inc., April 26, 1979, at pp. 22-29.

2. In fact, ITA is also unable to cite *any* evidence to support the district court's finding that Western threatened to cut off the Minnesota State Automobile Association ("MSAA") from its "Group 60" Las Vegas program if MSAA continued to promote TGCs. Like the Court of Appeals, ITA alludes only to evidence that Western enjoyed market leverage and that MSAA was "aware" of Western's leverage. Brief In Opp'n, p. 8. As to the critical September 25, 1973 meeting, both ITA and the Court of Appeals can cite only the testimony of Lynn Zumbrunnen, Western's regional director, that the "Group 60" program was discussed at the meeting. *Id.* But Zumbrunnen's testimony was that MSAA — not Western — brought up the "Group 60" program to remind Western that MSAA "had produced and sold many passengers to Las Vegas" for Western and that Western risked losing this MSAA patronage if it continued to advertise against TGCs. 18 Tr. 65. MSAA personnel at the meeting confirmed this account. 11 Tr. 77-78, 83, 185. There is *no* evidence in the record that Western threatened MSAA back. The validity of the district court's finding to the contrary is an issue that should clearly be considered on remand if this Court grants certiorari and reverses.

The "anti-TGC campaign" was at the center of both the district court's and the Court of Appeals' decisions. And there is no evidence that MSAA would have cancelled its ITA TGCs if there had not been a drop off in public interest attributable, according to the courts below, to Western's advertisement warning consumers of the dramatic drawbacks of TGCs. MSAA did not cancel its charters with ITA immediately after the September 25, 1973 meeting with Western, as it would have if Western's alleged threat had been the deterrent. Instead, it continued for several weeks to advertise the TGCs and to solicit customers to fill the charters. 10 Tr. 156-157, 178; 11 Tr. 97; Ex. 77. MSAA testified that it was ultimately forced to cancel the charters because of "lack of passengers" — not pressure from Western. 10 Tr. 177-178. Not surprisingly, therefore, there is no holding below that the alleged leverage, by itself, would have supported the damage award.

The district court's market leverage finding, in short, does not provide an alternative ground for affirming the decision below. The decision rests squarely on a perverse and novel reading of the Sherman Act that this Court should expunge.

II. WESTERN'S MARKET SHARE DOES NOT JUSTIFY THE DECISION BELOW

ITA appears to recognize that the Court of Appeals' decision does not rest on any inaccuracy or ambiguity in Western's ad but merely on the facts that Western engaged in its advertising campaign with the intent to prevail in the market and that the campaign was effective.[3] Apparently recognizing the weakness of this logic in a § 1 context, ITA attempts to justify the Court of Appeals' holding on the ground that Western held a large share of the Minneapolis-Hawaii market.

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3. ITA does not attempt to justify the Court of Appeals' decision on the basis of the district court's finding that Western's ad was in parts unintentionally inaccurate or misleading. Indeed, ITA expresses surprise that "so much of the Petition is devoted to trying to demonstrate the truthfulness of the September 16th ad." Brief In Opp'n, p. 16 n.19.

Contrary to ITA's argument that "any exclusionary conduct by one possessing monopoly power is proscribed by the antitrust laws,"[4] the courts have long recognized that a monopolist, like any other business, is free to compete vigorously even though in the process it maintains or expands its market share. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Memorex Corp. v. IBM*, No. 78-3050 (9th Cir. Nov. 18, 1980), *aff'g* 458 F. Supp. 423 (N.D. Cal. 1978); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273-75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *California Computer Prods., Inc. v. IBM*, 613 F.2d 727, 735-36 (9th Cir. 1979); *E. I. DuPont de Nemours & Co.*, 3 Trade Reg. Rep. (CCH) ¶ 21,770 (F.T.C. Oct. 20, 1980); 3 P. Areeda & D. Turner, Antitrust Law 73-83 (1978). In particular, a monopolist is free to publicize the advantages of its products and the drawbacks of those of competitors unless the *amount* of advertising is "so unwarranted by competitive exigencies as to constitute an entry barrier." *Berkey Photo, supra*, 603 F.2d at 287, *citing American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946). No court has ever condemned an advertisement under either § 1 or § 2 of the Sherman Act because of the competitive purpose of its sponsor, until the Eighth Circuit in this case.

Western's "anti-TGC campaign" consisted solely of one newspaper advertisement, several radio spots and a letter to Minnesota travel agents warning of the serious drawbacks of TGCs. The "anti-TGC campaign" did not involve any abuse of market power and neither the district court nor the Court of Appeals so found.[5] The Eighth Circuit

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4. Brief In Opp'n, p. 10.

5. ITA implies at one point that Western's letter to Minnesota travel agents constituted a veiled threat to use leverage in the Minneapolis-Las Vegas market to punish agents promoting TGCs. Brief in Opp'n, p. 13-14. There is no evidence to support this assertion. Both the district court and the Court of Appeals found that the letter was merely what it was intended to be — an informative letter drawing travel agents' attention to what Western viewed as the drawbacks of TGCs. App. 9a, 15a, 8d-9d.

condemned the "campaign" merely because it was a "full frontal attack" on TGCs engaged in with competitive intent. The absurdity of the Eighth Circuit's decision is demonstrated by the bottom line of ITA's argument — that a company with market power cannot advertise with the intent to maintain or expand its sales.

III. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH *BERKEY PHOTO*

ITA makes absolutely no attempt to distinguish most of the contrary precedents cited in the Petition. In a footnote, however, ITA attempts to distinguish *Berkey Photo, supra,* on several minor factual grounds, none of which go to either the logic or holding of *Berkey.* Brief In Opp'n, p.14 n.14. In particular, ITA contends that *Berkey* is irrelevant because Western "disparaged competition rather than bathing [its own] product in its best light."[6] *Id.* As elaborated in the treatise upon which *Berkey* relies, however, criticism of a rival's product should no more constitute a Sherman Act violation than promotion of one's own product, even when the criticism is assertedly false:

> "[D]istinguishing false statements [about rivals] . . . from customary puffing is not easy. Even at common law, this is 'a tort that never has been greatly favored.' More importantly, the effects upon a rival would usually be very speculative, especially when disparagement is not systematic. Many buyers, moreover, recognize disparagement as non-objective and highly biased. Although hardly a justification for falsehood, buyer distrust of a seller's disparaging comments about a rival seller should caution us against attaching much weight to isolated examples of disparagement. Essential, therefore, is a

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6. ITA also suggests that *Berkey* is distinguishable because Western's advertising "had a demonstrated *substantial* adverse effect" on competitors. Brief In Opp'n, p. 14 n.14 (emphasis in original). Kodak's advertising, however, had a very substantial adverse effect on the business of its competitors. 603 F.2d at 278 & 287. The Second Circuit refused to hold that Kodak's advertising violated the Sherman Act because there was no showing that the alleged *misrepresentations* had more than a *de minimis* effect on competition. *Id.* at 288 n.41.

> serious de minimis test. We would go further and suggest that such claims should presumptively be ignored." 3 P. Areeda & D. Turner, *Antitrust Law* 280-81 (1978).

See also Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342, 1354 (5th Cir. 1980), citing Areeda and Turner's conclusion that "mere misrepresentations of one's own or a rival's product" normally do not make out a § 2 violation.

IV. CONCLUSION

For these reasons, and for the reasons expressed in the Petition, petitioner again prays that a Writ of Certiorari issue to review the judgment and opinion of the Eighth Circuit in this case and restore advertising as a valid means of healthy competition.

Respectfully submitted,

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November 24, 1980